(1)

91-1115

Supreme Court, U.S.
FILED
JAN 2 1992
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

VILLY DIERNISSE - PETITIONER

VS.

BUSINESS COMMUNICATIONS COMPANY, INC.

and LOUIS NATURMAN RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

VILLY DIERNISSE, PRO SE

9 KAUFMAN DR.

WESTWOOD NJ 07675

(201) 664-6222

QUESTIONS PRESENTED

1) Is the Mediation Panel's decisions valid when:

a) It ruled contrary to the statutes of limitation?

b) It ruled on issues not part of the counterclaims?

c) It ruled on new issues and evidence not previously presented, and contrary to both parties consent in open court that the only issue was the "for hire" issue and with the new issues changing the thrust of the case?

d) It ruled contrary to the previous court ruling on the "for hire" issue, without any new claims or evidence?

e) Appellant's condition in agreeing to mediation had not been met?

f) It changed question No. 2 as agreed to by both parties before

the hearing?

g) It ruled contrary to the evidence introduced?

h) It departed far from the accepted and usual course of judicial proceedings?

i) Appellant was denied due process as guaranteed by the 14th Amendment to the U.S. Constitution?

2) May Appellees maintain the never before presented issue of joint ownership when it changes the thrust of the case?

a) If so; did Appellees' mutilations of Appellant's works constitute coauthorship or, did it constitute copyright infringement, slander and libel, unfair competition, and/or breach of thrust?

b) If Appelles were joint owners, did Appellant become the sole owner upon Appellees breaches of con-

tract and/or thrust?

3) May Appellees maintain a counter claim excluded under the statutes of limitation?

4) May Appelles maintain a counter-claim which they did not include in their Answer to Substituted Complaint?

5) Did Appellees' failure to account for and pay royalties on the first day of sales of both books, or their publication of derivatives of Appellant's works constitute copyright infringements, breach of contracts, slander and libel, unfair competition, and/or breach of trust?

6) Were Appellees' acts willful, malicious, in bad faith, and/or did they cause Appellant emotional distress?

7) Did Appellees engage in unfair

competition by advertising books competing with Appellant, and never publishing those books?

8) Did Appellees or Appellant breach the "Retort Pouch" contract?

9) Should the damages be determined in accordance with both parties uncontroverted evidence and testimony?

10) Should a previous ruling be adhered to if no new facts or points of law are introduced?

11) Did the courts below stray too far from the usual course of judicial proceedings in denying Appellant due process and in approving the Mediation Panel``s order.

TABLE OF CONTENT

Opinions Below 2

Jurisdiction 4

Constitutional and Statutory Provisions 4

Statement of the Case 4

Reasons for Granting the Writ 11

Conclusions 63

INDEX TO APPENDICES

See separate volumes of appendices.

TABLE OF AUTHORITIES

CASES

Abeshouse v. Ultragraphics Inc.
754 F. 2d 467, 473 (2d Cir. 1984) 26, 39

Alfred Bell Co.v. Catalda Fine Arts,
86 F. Supp. 309 (S.D.N.Y. 1949) 48,59, 60

Ben-Oliel v. Press Publishing Co.,
167 NE 432 (N.Y. 1929) 42

C. Blore v. 20/20 Advertising,
674 F. Supp. 671 (D.Minn. 1987) 42

Business Trend Analyst v. Freedonia Group
Inc., 887 F.2d 399 (2d Cir.1989) 58, 59

Callaghan v. Myers,
Sup Ct. Rep., 128 U.S. 617 (1888) 59, 60

Community for Creative Non-Violence

v. Reed, 109 S. Ct. 2166 (1989) 8,24,29

Contemporay Mission Inc.v. Famous Music Corp., 557 F.2d 918 (2d Cir. 1977) 60

Crucible Inc. v. Stora Koppabergs Bergslags A.B., 10 USPQ 2d 1190 (W.D.Pa. 1988) 53

Edison v. Viva Intern. Ltd., 421 N/S 2d 203, 70 AD2d 379 (1979) 41

Fedtro Inc. v. Kravex Mfg. Corp., 313 F. Supp. 990, (E.D.N.Y. 1970) 55

Ford Motor Co. v. B & H Supply Inc., 646 F. Supp. 975 (D Minn. 1986) 43

Frank Music Corp.v. Metro-Goldwyn Mayer Inc., 772 F.2d 505 (9th Cir. 1985) 60

Fromson v. Western Litho Plate and Sup. Co.,12 USPQ 2d 1856(E.D. Mo.1989) 61

Gardenia v. Log Cabin Products Co., 89 F.2d 891 (2d Cir. 1987) 41

Gilliam v.American Broadcasting Co. Inc., 538 F.2d 14 (2d Cir. 1976) 33, 38

Gorlin v. Bond Richman & Co. 706 F. Supp. 236 (S.D. N.Y. 1989) 18

Hinchliffe v. American Motors Corp., 184 Conn. 607 (1981) 54

Johns-Manville Corp. v. Guardian Ind. Corp., 13 USPQ 2d 1684 (E.D.Mich.1989) 61

Johnson & Son Inc. v. Drop Dead Co., 144 USPQ 257 (S.D.Cal. 1965) 60

Kamar International Inc. v. Russ Berrie

& Co.,752 F.2d 1326 (9th Cir. 1984) 60

Kennedy v. Johns Mansville Sales Corp.
135 Conn. 176, 62 A.2d 771 18

Locke v. Benton & Bowles Inc.,
1 NYS 2d 240 (1937) 41

Nolan v. Williamson Music,
300 F. Supp. 1311 (S.D.N.Y. 1969) 37

Raferty v. World Film Corp.,
167 NYS 1026 (1917) 49

Smith v. Montoro,
648 F.2d 602 (9th Cir. 1981) 43

Uniroyal Inc. v. Ruddkin-Wiley Corp.,
13 USPQ 2d 1192 (D.Conn. 1989) 61

Warner Bros. v. Gay Toys Inc.,
598 F. Supp. 424 (S.D.N.Y 1984) 60

Weneha Music Co. v. Weathermon,
11 USPQ 1395 (W.D.Mo. 1989) 54

Whelan Assoc. v. Jaslow Dental Labs.
609 F. Supp. 1307 (E.D.Pa. 1985) 55

Yonkers Raceway Inc. v. Standardbred
Assoc.Inc. 21 F.D.R. 3 (S.D.N.Y. 1957)
25, 28, 29, 39, 56

STATUTES

C.G.S. § 52.576(a) 4, 19

C.G.S. § 52.581(a) 4, 19

Title 17 U.S.C. §101 4

Title 17 U.S.C. §501 4, 5

Title 28 U.S.C. §1254 (1) 4

Title 28 U.S.C. §1331 4

Title 28 U.S.C. §1338 5

U.S. Constitution 14th Amendment 4, 16

OTHER

61 A Am. Jur.2d § 224 28

61 A Am. Jur.2d § 322 24

Nimmer on Copyright (12/90) § 6.02 29,31

" " " " § 6.03 32

" " " " § 6.05 32

" " " " § 6.10 35

" " " " § 6.12 35, 62

Prosser & Keton on Torts (5th Ed.)

Chapter 16 at 664 51

No._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM 1991

VILLY DIERNISSE - PETITIONER

VS.

BUSINESS COMMUNICATIONS COMPANY, INC.

and LOUIS NATURMAN RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Petitioner, Villy Diernisse, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Second Circuit granting Appellees' motion

to dismiss Appellant's appeal; and to review the judgements and opinions of the court below contrary to the statutes of limitation, allowing the thrust of the case to be changed with new issues, changing a previous ruling without new facts, of not ruling on the issues as presented, of ruling against the evidence and law, and in denying Appellant's rights to due process.

OPINIONS BELOW

All the opinions below are unpublished. The Order of the Court of Appeals denying Appellants Petition for a Review of Appellees' Motion for Dismissal appeals in Appendix J. The Order of the Court of Appeals granting Appellees' Motion for Dismissal appears in Appendix A. The Judgment of the District Court for the District of Conncticut appears in Appendix K. The Decision of Mediation Panel in the District Court for the

District of Connecticut appears in Appendix B. The Denial of Omnibus Motion by the District Court for the District of Connecticut appears in Appendix C. The Scheduling Order by the District Court for the District of Connecticut appears in Appendix D. The Omnibus Ruling by the District Court for the District of Connecticut appears in Appendix E. The Denial of Motion for Production of Evidence and Compliance with Oral Court Order by the District Court for the District of Connecticut appears in Appendix F. The Ruling of the District Court for the District of Connecticut appears in Appendix G. The Proposed Ruling on Motion for Preliminary Injunction by the District Court for the District of Connecticut appears as Appendix H. The Order of Preliminary Injunction by the District Court for the District of Connecticut appears as Appendix I.

JURISDICTION

The Court of Appeals Decision in this matter was filed on August 27, 1991. A timely petition for a review was filed on September 30, 1991. The Court of Appeals denial of the petition was issued on October 3, 1991; as set forth in Appendix K. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254 (1), and Title 17, U.S.C. § 501.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 14 to the U.S. Constitution Title 17, U.S.C. §101, and Connecticut General Statutes § 52.576 (a) and § 52.581 (a), all as set forth in Statutes and Constitution in the Appendix.

STATEMENT OF THE CASE

The United States District Court, District of Connecticut had jurisdiction pursuant to Title 28 U.S.C. §'s 1331 and

1338 (a) and Title 17 U.S.C. § 501.

Appellant and Appellees entered into three separate, express and oral contracts in 1979 and 1980 whereby Appellees were to publish three books (P-049, Forming I; P-034R, Food Packaging; and P-060, Retort) which Appellant would write. The contracts were identical except the last one, Retort, which included $1.50 extra per page for finish typing.

When Appellant wanted to deliver the finished manuscript for Retort on November 26, 1980, Appellees wanted to reduce the price for typing to $1.35 per page, to save $29.55, and Appellant did not surrender the manuscript. Appellees then refused to pay royalties on the other two books which they continued to sell and make derivaties of (the contracts did not contain any provisions for derivatives). Appellant claims that P-079, Forming II; P-063, Changing Film; and P, Barrier

Coextruded and other of Appellees' books are derivaties infringing his works. According to Appellees' records furnished during discovery they breached the contract for Forming I on January 29, 1980 and for Food Packaging on July 31, 1980, by failing to account for and pay royalties on books sold on the first date of publication and subsequently.

An agreement in October of 1982 for Appellees to stop publishing Forming I and Food Packaging and pay a sum of money to Appellant was never consumated because Appellees subsequently wanted the copyrights assigned to them.

Further attempts by Appellant to resolve the matter failed, and he filed suit on January 25, 1984, alleging copyright infringements, breach of contract, disparagements, slander of title, unfair trade, economic loss and emotional distress. In their Answer, Affirmative

Defenses, and Counterclaims, filed February 14, 1984 Appellees denied the allegations and claimed Appellant was barred by the statute of limitations, estoppel, and laches; and the books were "works for hire." Appellees' counterclaim alleged breach of contract on the Retort. Appellant's substituted complaint of February 18, 1986 added Appellees' president, Mr. Naturman as a defendant. Appellees' Answer to Substituted Complaint, filed more than two years late on May 25, 1988, is radically different from their answer to the original complaint. It added that Appellant is also barred by the statutes of frauds and they dropped their counterclaim and claim for damages.

At a hearing for an injunction on August 8, 1985 Magistrate Thomas P. Smith considered all the evidence and heard everybody familiar with the matter. The Magistrate in his Proposed Ruling on

Motion for Preliminary Injunction, filed September 3, 1985 found that Appellant was an independent contractor vel non, and the books could not possibly be "works for hire" under the Aldon doctrine. The Supreme Court has subsequently ruled in Community for Creative Non-Violence v. Reid, 109 S. Ct. 2166 (1989). that the Aldon doctrine is not relevant. The "for hire" issue under CCNV v. Reid is more favorable to Appellant than it is under the Aldon doctrine.

The parties at the same hearing stipulated on the record that the only factual issue in this matter is the "for hire" issue.

The proposed ruling by the Magistrate was approved by the District Court on September 25, 1985 and Appellees never objected to the injunction, but it was terminated three years later when Appellees motioned for a bond or termination

and Appellant did not have the financial means to post the bond.

In response to the Court Ruling of October 31, 1989 that they file their claim for damages, Appellees filed their claim for $7896.30 on November 7, 1989.

On January 19, 1990 Appellant agreed to binding arbitration, subject to five conditions, and Appellees agreed on January 30, 1990 to binding arbitration on Appellant's conditions.

On April 27, 1990 Appellant filed Motion for Production of Evidence and Compliance with Oral Court Order for Appellees to comply with Appellant's conditions for binding arbitration.

The Mediation Panel Order by the Court was filed on January 14, 1991.

Appellant's Motion of April 24, 1990 for Appellees to comply with Appellant's conditions for binding arbitration was denied on February 20, 1991.

On April 3, 1991 Appellees filed their Memorandum of law of Defendants for the Mediation Panel with the new issues, including their claim that Appelles were joint authors; and changing their claim of damages from $7,896.30 to $217,378.80.

On May 1, 1991 Appellant filed Omnibus motion, asking that Appellees not be permitted to introduce any new issues, for reconsideration of the Court's ruling of April 15, 1991 and dismissal of Appellees counterclaim, for an order precluding Appelles from changing their damage claim, and for permission of Appellant to claim damages under F.R.C.P. rules 11 and 28 and Title 28 U.S.C. § 1927. The Omnibus Motion was denied on May 14, 1991.

The Mediation Panel hearing occurred on May 21, and on June 20, 1991. At the later date Appellees introduced evidence not included in Defendants' Exhibits admitted on April 15, 1991.

The Decision of Mediation Panel was filed on June 20, and approved by the Court on June 26, 1991.

Appellant filed Notice of Appeal on July 30, 1991.

Appellees filed Motion to Dismiss Appeal on August 2, 1991, and this was approved on August 8, 1991.

On September 30, 1991 Appellant filed Petition for Reviev of Granting of Appellees' Motion for Dismissal. This was denied on October 3, 1991.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this petition presents issues resolved by this Court and contradicted by the courts below. The petition presents issues of contradictions of the courts below with decisions of other circuits as well as contradictions with decisions within their own circuit. The petition presents an issue of whether due process under the

Constitution has been given. The petition presents an issue of whether a mediation panel's decision is binding when a party's conditions for binding mediation have not been met, the terms of mediation is changed far beyond the original agreement, or the panel fails to consider the preponderance of evidence. The petition present an issue of whether new issues and evidence which change the thrust of the case may be introduced. The petition presents an issue of whether a defendant may present counterclaims not part of their answer to the complaint. The petition presents an issue of whether previously decided matters may be changed without new facts or points of law. The petition presents an issue of wheher the courts can rule contrary to the statutes without properly considering them. The petition presents issues of how far the courts can depart from the accepted and

usual course of judicial proceedings.

1) Certiorari Should be Granted Because the Mediation Panel's Decision is not Binding

Both Appellant and Appellees agreed to binding mediation (Appendixes M and N). Appellant on the condition that Appellees comply with all the outstanding items of the pretrial order, and furnish all the relevant evidence in their possession. None of this was ever done, and Appellant could not possibly prepare his case for mediation without them. The Court agreed at status meetings on December 18, 1989 and June 12, 1990 that the items should be produced, but on February 20, 1991 it denied Appellant's motion of April 27, 1990 (Appendix F) for production -- after the Mediation Panel Order had been issued on January 14, 1991. The denial was repeated at the hearing on April 15, at which time the Court also, over Appel-

lant's objection, limited the time to present the case-in-chief to two hours. On May 14, 1991 the Court denied Appellant's Omnibus Motion (Appendix C). It included requests that Appellees not be allowed to change the thrust of the case by introducing new issues or amend their damage claim, and dismissal of their counterclaim. Because Appellant has not been allowed access to most of Appellees's records he has been prejudiced. For instance, at the hearing before the Mediation Panel, Appellees claimed that the total income from sales of Appellant-079 was $24,725, and the expenses were $13,750. Appellees did not submit any proof, but the Panel accepted the figures because Appellant could not refute any of them.

Appellant has been denied due process. In Appellant's Pre-Trial Memorandum he estimated 7 days for the trial based on

the many issues and the large amount of evidence. The Court limited him to two hours and a memorandum of law of 15 pages It is impossibe to present the case fairly in that frame, especially in view of the many new issues raised by Appellees. (Appellees, with the Court's approval, was allowed to file a 21 page memorandum-in-chief to further disadvantage Appellant.) This is a very complicated case with 26 proposed issues in addition to four new and totally different issues introduced by Appellees. This allowed Appellant four minutes per issue plus two minutes for the rebuttal.

Important items which Appellant was not allowed to present, or only present partly include the joint author issue (a new issue), Appellees's claimed expenses for the infringing books, Appellees's tainted evidence, and Appellees's infringing acts in Forming I and Food

Packaging. However, there were many other issues where more time to present an accurate picture was needed. Issues such as slander of title, unfair competition, emotional distress, and Appellees's willful and malicious acts.

Appellant has been prejudiced because Appellees introduced new evidence, in violation of both the Court's Pre-trial Order and the Mediation Panel Order. Evidence which Appellant could have refuted by rebuttal evidence, if he had known of Appellees's new evidence.

The introduction of the new evidence and issues forced Appellant to use much of his limited time on them at the hearing -- to the detriment of the other issues.

The Courts have departed too far from the accepted and usual course of judicial proceedings,and Appellant has been denied due process of law as guaranteed by

section 1 of the 14th Amendment to the United States Constitution. The Panel would naturally reach the wrong conclusions when it was not presented with all the facts. It is the same as if a jury had reached a wrong decision based on the obvious evidence, erroneous instructions, or if one of the parties had not been permitted to present all the material facts. In this particular matter the Panel also reached wrong decisions based on the evidence introduced, as will be shown later. And just as in the case of a jury's verdict being overturned under those conditions, the same should be true here.

2) Certiorari Should be Granted Because the Counterclaim is Invalid.

It is undisputed that all the contracts were oral. Defendants' Interim Pre-Trial Memorandum of October 13, 1989 at 6:

"With respect to its counterclaim, BCC contends that by oral agreement, Plaintiff agreed to develop an additional work to be published by BCC under BCC´s corporate name,... ."

It is also undisputed that the Retort contract was breached on November 26, 1980 (Appendix P), when it was an executory contract with both parties still having to perform (Appellees had to do editing, publishing, promoting, selling, and pay money to Appellant; and Appellant had to deliver the manuscript, do editing, rewriting, and consult to customers). In Connecticut the Courts have held that the statute of limitation on executed, oral contracts is 6 years and on executory, oral contracts it is 3 years (Kennedy v. Johns Manville Sales Corp., 135 Conn. 176, 62 A.2d 771; Gorlin v. Bond Richman & Co., 706 F. Supp. 236 (S.D.N.Y. 1989)).Appellees´s Answer,

Affirmative Defenses and Counterclaims (Appendix Q) were filed on February 13, 1984 more than three years after the alledged breach.

Appellant filed a substituted complaint on February 18, 1986. More than two years later, on May 13, 1988, the Court ordered Appellees to file their answer (Appendix D), which they did on May 25, 1988 (Appendix O). Appellant maintains the Court abused its discretion by allowing Appellees to answer after such a long, unexcused delay.

Appellees's answer to the substituted complaint is radically different from their original answer and they chose not to make any counterclaims or claims for damages. In their Affirmative Defenses they did make a reference to incorporate their affirmative defenses from their previous answers, but not their counterclaim or claim for damages, and the words

"affirmative defenses" cannot possibly mean "counterclaim."

Appellant's motion for dismissal of the counterclaim was denied in the Omnibus Ruling of May 13, 1988 at 54 (Appendix E). The Court erred in applying C.G.S. § 52-576(a) which concerns written contracts, but as the Court acknowledged in its ruling at 17 and 23; this is an express, oral contract governed by C.G.S. § 52-581(a).

Appellant has continued to argue the point and in his motion of October 25, 1989 (Appendix J) asked for a reconsideration. At a status conference on October 30, 1989 the Court agreed with Appellant's position and issued a ruling on October 31, 1989 (Appendix G) to hold matters on the counterclaim in abeyance until Appellant identified the request for dismissal (Appellant's Second Motion for Contempt of March 19, 1987), which

was done in Appellant's Compliance with Ruling of October 31, 1989, of November 14, 1989 at 6:

> "4. Plaintiff's Document Requesting Dismissal of Counterclaim. Plaintiff requested dismissal of Defendants' Counterclaim on March 19, 1987 in his Second Motion of Contempt (Exhibits E to H). This motion included Exhibit I. Other parts of the record which supports the fact that this was an oral contract breached by Defendants more than three years before their filing of the counterclaim are Exhibits J and K. The last one is an admission by Defendants that the contract was oral."

The motion of October 25, 1989 was denied by Magistrate F. Owen Eagan on April 15, 1991, and an omnibus motion (Appendix C) which included a request for reconsideration was denied on May 14,

1991, when he claimed he could not overrule the original denial of May 13, 1988, and the Panel refused to consider the issue. Both the Court and the Panel abused their discretion. The original decision was an interim decision which is not binding when new facts are introduced, and the Panel's mandate was to rule on all issues of law and facts.

The counterclaim is invalid because:

a) It was filed after the three year statute of limitation.

b) The Court abused its discretion in ordering Appellees to file a late answer.

c) Appellees filed their answer to the substituted complaint unexcuseably more than two years late.

d) Appellees never filed a counterclaim as part of their answer to the substituted complaint, it is not part of any of their pleadings, it has not been filed to conform to the evidence, and it

has not been introduced with Appellant's express or implied permission.

e) The ruling of May 13, 1988 was an interim ruling, and both the Court and the Panel abused their discretion in not ruling on the issue again.

f) Appellees are estopped because they waited until Appellant was successful before filing their counterclaim.

Because the counterclaim is invalid, the decisions on Question Nos. 13, 14, 21, and 22 are also invalid.

3) Certiorari Should be Granted Because Appellees have Introduced New Issues.

Appellees filed a Memorandum of Law of Defendants for Mediation Panel on April 2, 1991 (Appendix R) wherein they introduced a number of new issues. The main one changed the thrust of their defense from being "works for hire" to joint authorship. Appellees have never raised

this issue in their answers to either the original or substituted complaint, in their numerous and voluminous pleadings, or in any of their arguments at the many hearings and status meetings. Appellant has never implicitly or expressly consented to include any new issue. And none of the new issues conforms to the evidence, all of it in Appellees's possession before they filed their answer to the substituted complaint. They are not permitted to introduce any new issues beyond the pleadings if those issues change the thrust of the case to prejudice Appellant (61 A Amer Jur 2d § 322), and the new issues do both. Appellant has no way of preparing his case with respect to them. The Court closed discovery two years ago, and, for instance, regarding the joint authorship issue, Appellant would among other things have to deposition Appellees and their former

editor to learn about their claimed contribution to the various books. The Court evidently also believed that the only issue was the "for hire" issue. It in its pre-trial order of August 23, 1989 ordered the parties to submit briefs on the impact of the Supreme Courts decision in Community for Creative Non-Violence v. Reid 109 id.

The parties stipulated in open court that the only issue was whether Appellant was an independent contractor (Proposed Ruling on Motion for Preliminary Injunction of September 3, 1985 at 63 (Appendix H). Ordered September 25, 1985 (Appendix I)), and if Appellant was such, then the books in issue could not be "works for hire" (Magistrate Smith determined that Appellant was an independent contractor vel non (Appendix H at 77, 79)). While this stipulation was for the purpose of determining whether a preliminary injunc-

tion was warranted, the other issues, including the joint author issue, would be of equal importance in determining the appropriateness of the injunction, and it is clear that Appellees is breaching their previous agreement that the only factual issue is the "for hire" issue.

While an interim decision is not binding at the trial on the merits, it should be adhered to unless new facts are presented or an error has been committed (Yonkers Raceway Inc. v. Standardbred Owners Association Inc. 21 F.R.D. 3 (S.D.N.Y. 1957)). There are no new facts or errors to warrant changing the thrust from a works "for hire" issue.

Appellees never appealed the injunction, or that the "for hire" issue was the only factual issue, and consequently cannot later question it. (Abeshouse v. Ultragraphics, Inc. 754 F.2d 467 (2d Cir. 1985)). Neither the joint author or any

of the other new issues were mentioned in their motion for a bond or termination.

As discussed above, Appellant tried to have the new issues dismissed.

The new issues should not have been ruled on because:

a) They have never been introduced in any pleading.

b) They change the thrust of the case to Appellant´s detriment.

c) Appellees have never motioned for them to be introduced.

d) Appellant has never consented to their introduction.

e) No new evidence or errors warrants their introduction.

f) They are not included in the parties consent of what the issues are.

h) Appellant has not been permitted to do any discovery related to them.

i) Appellant had no way of researching the issues on such short notice.

Each of these reasons warrants setting aside consideration of the new issues, and consequently the Panel's decisions as they relate to Question Nos. 1, 7a and 12 as they pertain to P-034R are improper. Also because it is uncontroverted that all of the contracts were identical as to who owned the copyrights, and P-034R was the only copyright decided on by any of the new issues, this copyright should have been granted to Appellant. In the alternative it should have been granted to Appellant because the "for hire" issue has been decided, and that decision should be adhered to (Yonkers Raceway Inc. v. Standardbred Assoc. Inc., id).

4) Certiorari Should Be Granted Because The Panel Erred And Abused Its Discretion In Its Decisions Of Specific Questions.

Question No. 1. Joint Ownership.

The decision that the copyright to P -034R is jointly owned is incorrect for a number of reasons.

The Panel abused its discretion in allowing a new issue to be introduced, in not permitting Appellant a full and fair opportunity to present his side of the issue, and in not striking, as requested, the joint authorship defense as inconsistent with the "for hire" defense (61 A Am. Jur.2d § 224).

The ownership should be determined under the "for hire" doctrine as ruled on by the Supreme Court in Community for Creative Non-Violence v. Reid id.

The "for hire" issue has been decided (Appendixes H and I), and although this was an interim decision it should be adhered to in the present case because no new facts or evidence of any errors have been presented (Yonkers Raceway v. Standardbred Owners Association id).

Both parties had stipulated on the record that the "for hire" issue was the only factual issue, and that is a final agreement which cannot be reneged on . The Panel erred in its consideration of both the law and facts on the joint author issue. Both authors must intend that their works be unified **before** either contribution (Nimmer on Copyright § 6.02) (Emphasis added), and there is no such intentions evidenced by any testimony or evidence. The evidence showed that Appellees did furnish a small of amount of research material , but Appellant never used any of it, and Appellees did not show a single sentence of their material used by Appellant. And even if Appellees furnished all of the research material it would not make them coauthors since it is the expresion of the ideas which makes an author, and not the ideas themselves.

Appellant never intended the works to be joint authorship works. He submitted the manuscript on March 11, 1980. Appellees edited the manuscript and made very minor changes on a few of the pages, mainly corrections of grammar, spelling, and punctuation. In Appellees's letter of May 6, 1980 Ms. Bakker, Appellees's editor, asked who should make some suggested changes. She presumed that Appellant wanted to do them so that he would not have to correct her work. Proof that Appellees had not done any coauthorship.

Appellant submitted the final manuscript on May 12, 1980. Prior to that there were no intention by either party that it was to be a coauthored work. Appellees did not add a single word to that manuscript before Appellant finished it and submitted it, and Appellees have not submitted any evidence of any claimed coauthorship before that date. Even if

there had been a subsequent agreement of coauthoship it could not have been a joint work (Nimmer § 6.02)

Appellees subsequently did mutilate Food Packaging by making unauthorized changes, which are the basis of some of Appellant's claims of copyright infringement, unfair competition, and breach of trust.

In the editing stage there were a number of oral and written communications between the parties, but never an agreement of coauthorship. However, even if it was an agreement the work would still not qualify as a joint work. It would have been a derivative (Nimmer § 6.05), and Appellees have never claimed such. When Appellant received a copy of the published version he strenuously objected to the mutilations of his work. Proof he never intended it to be a joint work.

The authorities relied on by Appellees

(Appendix R at 118) are not relevant to this case, which is governed by the 1976 Copyright Act, and neither is their argument citing the "12th Street Rag" case (Nimmer § 6.03).

Even if Appellees are correct that they changed 5 - 10% of Food Packaging they are not coauthors because most of the changes consist of deletions, which cannnot be copyrighted. For instance, Appellees deleted 29 of Appellant's 213 tables. The other changes are from copyrighted publications.

Except that the third contract, Retort, included finish typing, all the contracts were identical, including who owned the copyrights. At the hearing Appellees first claimed they were coauthors of all three book, but later admitted that they were not coauthors of Forming I and Retort, but they did not introduce any evidence that the Food

Packaging contract was different.

Appellees's mutilations are copyright infringements and not coauthorship (Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2d Cir 1976).

In all of their promotional literature and on the title page of Food Packaging Appellees are claiming Appellant as the only author.

Appellees did not claim coauthorship in their copyright application.

In the hearing before the Magistrate Smith neither Appellees nor Ms. Bakker claimed any coauthorship. Their claims were for supervision, and Magistrate Smith found the testimony of Appellees contradictory (Appendix H at 76). Appellees admitted that Appellant was responsible for the specifics of the job. The Magistrate at 77-78 did not find Ms. Bakker's testimony of her supervision persuasive, compelling, or creditable.

He believed her to be a good **editor** (emphasis added).

In Appellees's deposition (Appendix S) at 121-126 Appellees admit that Appellant is the author; that Ms. Bakker mostly wrote reports and was not involved with other writers; that she served as an editor and she did anything a good editor would do; and that it was company policy to put the name of the author or projct supervisor on the title page. Appellees stated that an individual listed as such did most of the work, most of the research, and **all** of the writing (emphasis added).

There are other reasons why Appellees are not joint owners. A joint owner may not grant exclusive licenses or exploit or alter the work so it is destroyed (Nimmer § 6.10). Appellees have expropiated the work for their exclusive use, and whether we accept Appellees's commer-

cial life of the works as one and a half, two and a half or ten years, Food Packaging is older than that and consequently it is destroyed by Appellees's use. Appellees have altered and mutilated Food Packaging to the extent that it is destroyed. A joint owner must account to the other owners because a constructive trust exist (Nimmer § 6.12). Appellees have never made any accounting or shared any profits with Appellant.

Question No. 2.

Did Defendants Infringe Plaintiff's Copyrights.

The Panel and the parties agreed that Question No. 2 should read: "If the answer to No. 1 above is "plaintiff," did defendants infringe plaintiff's copyright in P-049 and P-034R by the publication of P-049 and P-034R or any other publication?" The Panel on its own changed that to read: If the answer to 1 above is

"plaintiff," did defendants infringe plaintiff's copyrights in P-049 and P-034R by any other publication?" The Panel thus eliminated those two books from consideration as infringements. Yet the Panel in its determination of damages agreed that Appellees continued to publish (infringe) after the breaches. Appellees infringed in those two books and at least two others besides P-079.

It is uncontroverted that Appellees breached the contracts of both books on the first day of publication by not accounting for or paying royalties on books sold. For instance, a copy of Forming I was sold to Mitsubishi on January 29, 1980, the first day of its publication, but it was not reported on the royalty sheet. A copy of Food Packackaging was sold to Diamond International on July 31, 1980, the first day of its publication, but it was not reported on

the royalty sheet. (Appellant proved conclusively at the hearing that it is Appellees's standard operating procedure to cheat on the royalties of the first copy of each book sold). In addition Appellees cheated on other sales. For instance, copies of Food Packaging sold to Omega and Infotex were not reported on the royalty statement. A contract is breached when accounting of royalties omits a share of earnings (Nolan v. Williamson Music 300 F. Supp. 1311 (S.D.N.Y. 1969)). Appellees's continuing sales after the breach are infringements.

The Panel erred in ignoring the many breaches by Appellees, even though none of them were denied by Appellees, and in finding that the breaches of contract did not occur until November 26, 1980. However, Appellees continued to sell both books after November 26th, indeed, according to Appellees's records, more of

Food Packaging were sold after that date than before. There is no doubt that Appellees infringed both books. Appellees also infringed Food Packaging by their unauthorized changes (Gilliam v. American Broadcasting Companies, Inc. id)

Appellant presented evidence that Appellees had copied from Appellant's work in at least two other books, P-063 and P-071; that, although Appellees and Appellant apparently used the same sources, Appellant's material was substantially different from Appellees's; and that the authors of P-063 and P-071 copied from Appellant rather than from Appellees.

Appellant also introduced evidence that Appellees had copied in 60% of the books Appellant had been refused access to.

Question No. 3. If Plaintiff Did Not Own The Copyrights, Did Appellees Own

Them Under The For Hire" Doctrine

The Panel erred in its decision. It is an applicable issue, and the only factual issue agreed to by the parties (Appendix H at 63). It was never contested by Appellees, and consequently cannot be challenced at a later date (Abeshouse v. Ultragraphics Inc. id)It must be adhered to when no new facts are introduced (Yonkers Raceway Inc. v. Standardbred Assoc., Inc. id)

Question No. 4. If Defendants Owned Any Copyrights did Plaintiff Become the Owner Due to Defendants' Breach

The Panel erred and abused its discretion. The question certainly is applicable in view of the fact that Appellees breached the contracts; either as Appellant proved, on the first day of sales of each book; or on November 26, 1980 as the Panel determined. On one of these dates the copyright to Food Packaging belongs

to Appellant if it did not belong to him at creation.

Question No. 5. Did Defendants slander and or Libel Plaintiff.

The Panel's decision that Food Packaging was coauthored is erroneous as previously discussed. Appellees libeled Appellant by mutilating the work without permission. They went beyond their customary editing, and their editing is a far cry from the mutilated product they falsely attributed to Appellant's authorship. The right to change and edit is to mean what is customary in the trade (Edison v. Viva International, Ltd., 209 USPQ 345 (1979), 70 AD 2d 379.

Their original editing consisted mainly of grammatical corrections on the first 50 pages, nothing on the next 103 pages, then two minor corrections and nothing on the next 43 pages. This pattern continued for the rest of the

manuscript. Appellees's subsequent mutilations are slander of title and libel, which have hurt Appellant both emotionally and financially. It has hurt his reputation and standing as a professional author. Appellant have received numerous complaints, and Appellees have testified that they got complaints on Food Packaging because of the mutilations (Appendix S at 120-121).

Injury to ones professional reputation is libel (Gardella v. Log Cabin Products Co., 89 F.2d 891 (2d Cir 1987); Locke v. Benton & Bowles Inc., 1 NYS 2d 240 (1937)). Appellees credited the entire mutilated Food packaging to Appellant (despite their claim of coauthorship), and false attribution is libel, and special damages need not be proven because it prejudices ones livelihood (Ben-Oliel v. Press Publishing, Co., 167 NE 432 (N.Y. 1929).

Question No. 6. Did Defendants Engage in Unfair Competition

It is Uncontroverted that Appellees advertised two books, GA-053 and P-091, for more than five years (with newer publication dates) in competition with Appellant´s Retort, but without ever intending to publish such books, and for the sole purpose of drawing customers away from Appellant, whose sales dropped from 32 to 5 books a year. A deception so material as to affect the purchase decision is unfair trade (Blore v. 20/20 Advertising, 674 F. Supp. 671 (D. Minn. 1987); F Motor Co. v. B & H Supply, Inc., 646 F. Supp. 975 (D. Minn 1986)).

Other uncontroverted evidence shows that Appellees promoted and sold infringing books of which Appellant essentially was the author, but without crediting him as such, and thus damaging his professional status and ability to earn a

living. This is false attribution and reverse passing off, and a violation of the Lanham Act and unfair trade (Smith v. Montoro, 648 F. 2d 602 (9th Cir 1980). Appellees's mutilation of Food Packaging and their false attribution of Appellant as the sole author are equally unfair trade.

Question No. 7a. Are Defendants' Contributions Copyrightable?

The Panel erred with respect to P-034R in view of the evidence introduced. Appellees's contribution consist mainly of deletions, and as such do not qualify for copyright protection.

Question No. 9. Did Plaintiff Give up his Rights to Statutory Damages.

Appellant believes that the Panel abused its discretion in not ruling on this issue.

Appellees registered the books within the statutory period, and Appellant

contends that it does not matter who does the registering, even if some of the information on the application is incorrect. The purpose of early registration is to put the world on notice as to who owns the copyright, and not to punish innocent victims or create useless technicalities.

There has not been any decision on this issue by the Courts, but it is of such importance that it should be ruled on by the Supreme Court.

Question No. 12. Were Plaintiff and Defendants Joint Authors

Appellant is only challenging the Panel´s desicion on Appellant-034, and as Question No. 1 second part is essentially the same, the arguments presented there are relevant here.

Question No. 13. Appellees did Plaintiff Breach the Retort Contract?

Based on all the facts including the

oral arguments at the hearing it is clear that it was Appellees who breached the Retort contract, which is consistent with the Panel's finding that it was Appellees who breached the other contracts and engaged in the copyright infringements. Appellees have never argued the point and have only introduced one letter, which contradicts the other evidence.

Question No. 14. What Damages are Defendants Entitled to.

Appellant believes that Appellees is not entitled to any damages because of his arguments relating to the counterclaim and breach of the Retort contract, however, even if those are allowed to stand, the damages are still incorrect.

In response to the Court order of October 31, 1989, Appellees filed their total damage claim of $7896. This was based on their estimated sales of 25 books at $950. However, their prospec-

tus, introduced as evidence at the hearing, advertised the book for $725, bringing their gross profit down to $2271 -- substantially below the Panel's speculative figure of $3115.05. The Panel added publicity expenses of $3500 and $320.21 expenses paid. These are not additional expenses but part of the cost of every book and paid before the gross profit is determined. Both Appellees and the Panel also failed to account for the many books that sold at a discount. Based on Appellees's partial records, the discount would be $670 on 25 books. Appellees's original figure is also highly speculative because it is based on sales of 25 copies, but Appellees claim only 16 sold of Forming II. If they had sold 16 Retorts, they would have had a loss. Neither Appellees nor the Panel gave any reason why Appellees could expect to sell more than 50% more of Retort than Forming

II. In other words, Appellees is alternatively claiming sales of 25 and 30 copies of a book they never published but hope to collect damages on, and at the same time they claim they only sold 16 copies of a book on which they have to pay damages on. If they had believed they could publish Retort at a profit, they could have done so in a matter of weeks, especially since they claim to be coauthors and that it was a "work for hire". In either case they would have had the book in their possesion.

The figures are also highly speculative because they are unsupported by any testimony or evidence except their damage claims. Appellees filed the first one in compliance with the Court order of October 31, 1989 and introduced the second one at the Panel hearing. They are supposed to be identical, but Appellees tainted the second one by erasures and

additions and are now claiming that the sales should be 30 instead of 25 copies.

The figures are incorrect and speculative, and Appellant does not have to accept Appellees's unsupported data, especially since he has not been permitted to complete his discovery. It is up to Appellees to prove their figures (Alfred Bell Co. v. Catalda Fine Arts, 86 F. Supp. 309 (S.Appellees.N.Y. 1949)).

Question No. 15. Did Defendants Breach Any of the Contracts? When?

A and B Appellant believes the Panel erred in determining that the Forming I and Food Packaging contracts were breached on November 26, 1980. As discussed in Question No. 2, Appellees never contested that the breaches occurred on the date of publication and first sales of each book, and that they were repeated each time Appellees cheated on the royalties. Giving of false and untrue

reports and refusing Appellant access to the books is cause to rescind the contracts as such acts are material and willful breaches and a repudiation of the contracts or an essential part thereof, and such breaches substantially defeats the purpose of the contracts (Raferty v. World Film Corp., 167 N.Y.S. 1027 (1917)).

Appellant has discussed this issue in Question No. 13, and as the two questions are interdependent, he asks that the two be considered together.

Question No. 16. Did Defendants Cause Plaintiff Emotional Distress?

It is obvious that Appellees caused Appellant emotional distress. It is only natural that when a person's livelihood is severely curtailed that he suffers emotional distress. By the Panel's own determination, Appellees breached both contracts on November 26, 1980 and there-

after refused to pay any royalties. Royalties is the only income of a professional writer, and it is obvious that Appellant would be distressed. It is just as natural that Appellant suffered emotional distress when Appellees libeled Appellant as discussed in Question No.5, when Appellees committed their unfair competition against Appellant as discussed in Question No. 6. and when Appellees infringed on Appellant's works as discussed in Question No. 2. And they just as certainly caused Appellant emotional distress when they assaulted him during discovery. All the evidence is uncontroverted, and the Court erred, as a matter of law, in not setting aside the Panel's decision.

Question No.17. Were Defendants Acts Willful, Malicious, or in Bad Faith?

Appellant proved conclusively that Appellees always hide the first sale of

each book to cheat on the royalties as well as continually cheating on royalties of subsequent sales. This is willful, malicious, and in bad faith.

All of the evidence shows that Appellees never intended to carry out the contracts, and that is fraud (Prosser & Keton on Tort (5th Ed.) Chapter 16 at 664. Fraud is willful, malicious, and in bath faith.

The Panel determined that Appellees breached the P-034R and P-049 contracts on November 26, 1980, and even if Appellant had breached the Retort contract, it was bad faith for Appellees to breach the other two contracts. Appellees continued to sell the books after they breached the contracts and that can only be willful. Appellees advertising of non-existent Retorts for the sole purpose of driving Appellant out of business is definitely malicious.

Appellees cannot be innocent infringers if they have been notified that they are infringing. Appellant informed Appellees of the infringements on November 26, 1980 and at a meeting in October of 1982. Appellees even continued selling Food Packaging and published Forming II after the filing of this suit. And Appellees continued to promote the Books after the preliminary injunction. All of this is willful, malicious, and in bad faith.

The Panel's decision is inconsistent with its finding that Appellees breached the contracts, but that their sales after the breach are not willful.

In view of the conclusionary evidence, the Panel erred in not finding that Appellees's acts were willful, malicious, and in bad faith as a matter of law.

Question No. 18. Is Plaintiff Entitled to the Following Damages

A. Restitution. The issue is elective with Appellant, and the Panel abused its discretion in not allowing Appellant the choice. Appellant introduced evidence that Appellees profited from their acts above and beyond the compensatory damages suffered by him, and a wrongdoer must not profit from his evil deed.

C. Punitive Damages. Appellees's acts were willful, malicious, and in bad faith as discussed under Question No. 17; and as such Appellant is entitled to punitive damages (Crucible Inc. v. Stora Koppabergs Bergslags A.B., 10 USPQ 2d 1190 (W.Appellees.Pa. 1988); Hincliffe v. American Motors Corp., 184 Conn. 607 (1981)).

E. Costs Costs like attorney fees are awarded to the prevailing party on copyright claims. Both parties claimed the copyright to both books and Appellant claimed infringements. The Panel deter-

mined that Appellees infringed, that Appellant owned the copyright to one book, and that the other book was jointly owned.

The Panel´s decision that the the Retort contract was breached by Appellant is irrelevant in determining who is the prevalent party as that is not a copyright matter, but a contract matter for which costs are not awardable.

Appellant is clearly the prevalent party and as such is entitled to his costs. The award of costs is the rule rather than the exception (Weneha Music Co. v. Weathermon, 11 USPQ 2d 1395 (W.D.Mo. 1989)). Appellees´s obstruction of the case´s resolution, amply evidenced in Appellant´s brief for the Panel has increased Appellant´s cost beyond anything reasonable, for which Appellees should be held responsible (Fedtro v. Kravex Mfg. Corp., 313 F. Supp. 990

(E.D.N.Y. 1970)). The costs are to be allowed if Appellees's acts are willful (Whelan Assoc. v. Jaslow Dental Lab., Inc., 609 F.Supp. 1307 (D.C.Pa. 1985)). As discussed in Question No. 17 there is no doubt that Appellees's acts are willful, malicious, and in bad faith.

G. Injunction. Appellant is entitled to a permanent injunction. He presented evidence, as discussed in Question No. 17, that Appellees continued to infringe after the filing of this suit and after the issuing of a temporary injunction (confirmed by the Panel in its determination of the damages); and he presented evidence, as discussed in Question No. 6, that Appellees engaged in unfair competition. If the Court does not grant an injunction Appellees would continue their infringements and unfair trade, and Appellant would have no way of earning a living.

Appellees have never presented any evidence or argued against the issuing of a permanent injunction. A temporay injunction was issued on September 25, 1985 after a hearing before Magistrate Smith, and while it is not binding it should be adhered to unless new evidence or errors are found (Yonkers Raceway Inc. v. Standardbred Assoc., Inc. id). Appellees never objected to the merits of the injunction or appealed it, but they did file for a bond or dissolution, and the Court terminated the injunction when Appellant, due to Appellees's infringements and unfair competition, was unable to post the $1000 bond.

Question No. 19. Amount of Damages Due Plaintiff.

B. As discussed in Question No. 2, Appellees breached the contracts on the first day of publication of each book, however, the Panel determined that the

breach occurred on November 26, 1980, but in any event Appellees continued to promote and sell Forming I, Food Packaging, and Forming II after both dates. All of those sales are infringements and the damages cannot be determined by royalties on a past contract. The only time royalties can be used are for the period before the breaches, and then only if they are accurately reported.

Other damages due Appellant are those accruing after the breaches. Appellant's damages, Appellees's profits, Appellees's value of use, and Appellees' goodwill, all based on the facts (Business Trend Analyst, Inc. v. Freedonia Group, Inc. 887 F.2d 339 (2d Cir 1989)).

Appellant submitted a detailed analysis of the damages due him based on all the available evidence (much of it from Appellees's submissions). Appellees have not controverted any of it, it is the

only non-speculative information available, and it should be used for determining the damages.

D. The Panel's determination that only 25% of Forming II is attributable to Appellees's infringements is wrong. Almost all of Forming II came from Forming I (as is evident by looking at the tables of contents of both books). Forming II has the look and feel of Forming I, and it is essentially a condensed version of Forming I, the value of which has been destroyed by the publication of Forming II. If Appellees mixes his copyrightable work with the non-copyrightable so that it cannot be separated, they must answer for all their profits (Callaghan v. Myers, Sup Ct. Rep., 128 U.S. 617 (1888).

Part of Appellees's profits include goodwill and their use of the reports for research in writing other reports and

newsletters and presentation of seminars (Business Trend Analyst v. Freedonia Group, Inc. id). Appellees claimed those financial values in their Motion for Posting of Bond or Termination of Preliminary Injunction of May 14, 1987, at the hearing on that motion on December 1, 1987, and in Exhibit Y of their Memorandum of Law of April 2, 1991. Uncontroverted evidence and testimony by Appellees of profits are proper values to be used in determining the profits (Alfred Bell Co. v. Catalda Fine Arts id).

Appellees's expenses are not supported by any evidence and many of them are not allowable (Callaghan v. Myers id; Kamar International, Inc. v. Russ Berrie & Co., 752 F.2d 1326 (9th Cir 1984); Alfred Bell Co. v. Catalda Fine Arts id; Warner Bros. v. Gay Toys, Inc., 598 F. Supp. 424 (S.D.N.Y. 1984)) ; Johnson & Son, Inc. v. Drop Dead Co., 144 USPQ 257

(S.D.Cal. 1965)) Appellant cannot be expected to prove false or untendable Appellees's claims of expenses. It is up to Appellees to prove everything, and all doubts must be resolved in Appellant's favor (Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918 (2d Cir 1977); Alfred Bell & Co. v. Catalda Fine Arts id; Frank Music Corp. v. Metro Goldwyn Mayer Inc., 772 F.2d 505 (9th Cir 1985).

F. While in the past it was customary to use statutory interest rates, the current approach is to use actual rates compounded, as they more accurately reflects modern banking practices (Uniroyal Inc. v. Rudkin-Wiley Corp., 13 USPQ 2d 1192 (D. Conn. 1989); Johns-Manville Corp. v. Guardian Industries Corp., 13 USPQ 2d 1684 (E.D. Mich. 1989); Fromson v. Western Litho Plate & Supply Co. 13 USPQ 2d. 1856 (E.D. Mo. 1989)).

Appellant introduced evidence of the prime rates during the period in question, and as this was uncontroverted by Appellees, those rates should be used in calculating the interest.

Question No. 20. Did Defendants Breach Any Trust to Plaintiff

Appellees definitely breached their trust to Appellant. Appellees failed to account for or pay royalties from the very beginning and at various times thereafter. Appellees falsified their records to show sales of lesser amounts than received from their customers. Appellees mutilated Appellant's works. Appellees published derivatives without Appellant knowing it, to curtail sales of Appellant's works.

The Panel's determination that Appellees did not breach their trust and that Appellees are joint owners is illogical. A constructive trust exist in a joint

ownership (Nimmer § 6.12), and as the Panel determined, Appellees breached their contract in Food Packaging.

That Appellees breached their trust to Appellant is the only logical conclusion to be drawn from the evidence, and the Panel erred in reaching its conclusion.

Question No. 21. Are Defendants Entitled to Damages?

B. Appellant relies on his answer to Question No. 14, and asks the Court to take the same action as asked for in that question.

F. Appellees have never claimed any interest in their answers to the original or substituted complaint, their pleadings or their memorandum for the Panel.

Since they have not claimed any interest, they cannot possibly be entitled to it.

Question No. 22. Amount of Defendants' Damages

Appellant relies on his anwer to Question No. 21, and asks the Court to take the same action as in that question.

CONCLUSIONS

Appellant is respectfully asking that the Court grant a writ of certiorari because the Court below has ruled against the rulings of the Supreme Court, appellate courts in other districts, or the issues present important questions on federal law not previously decided. Appellant presents that:

The Mediation Panel's Decision is not binding when Appellant's conditions for binding mediation have not been met, the terms of the mediation is changed beyond the original agreement, the Panel fails to consider the preponderance of evidence, and Appellant has been denied due process.

The counterclaim is invalid because it

was filed after the statute of limitation, and alternatively because it was not filed in Appellees Answer to Substitued Complaint.

Appellees are not allowed to introduce new issues which change the thrust of the case.

Issues previously decided cannot be changed without new facts.

Respectfully submitted on January 2, 1992

Villy Diernisse

Villy Diernisse, pro se
9 Kaufman Dr.
Westwood NJ 07675
(201) 664-6222

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(2)

91-1115

Supreme Court, U.S.
FILED
JAN 2 1992
OFFICE OF THE CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

VILLY DIERNISSE - PETITIONER

VS.

BUSINESS COMMUNICATIONS COMPANY, INC.

and LOUIS NATURMAN RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDICES No. 1

VILLY DIERNISSE, PRO SE

9 KAUFMAN DR.

WESTWOOD NJ 07675

(201) 664-6222

65

INDEX TO APPENDICES

Appendix A Granting of Motion for Dismissal of Appeal by Appelles by the U.S. Court of Appeals, Second Circuit 3

Appendix B Decision of Mediation Panel adopted by the District Court for the District of Connecticut 4

Appendix C Denial of Omnibus Motion by the District Court for the District of Connecticut 15

Appendix D Scheduling Order by the District Court for the District of Connecticut 17

Appendix E Omnibus Ruling by the District Court for the District of Connecticut 19

Appendix F Denial of Motion for Production of Evidence and Compliance with Oral Court Order by the District Court for the District of Connecticut 59

Appendix G Ruling by the District Court for the District of Connecticut 61

Appendix H Proposed Ruling on Motion for Preliminary Injunction by the District Court for the District of Connecticut 65(2)

Appendix I Order of Preliminary Injunction by the District Court for the District of Connecticut 87(2)

Appendix J Denial of Motion for Reconsideration of Ruling and Order Dated September 22, 1989 89(2)

Appendix K Denial of Petition for Review of Granting of Appellees Motion for Dismissal by the U.S. Court of Appeals, Second Circuit 90(2)

Appendix L Judgment by the District Court for the District of Connecticut 91(2)

Appendix M Letter of January 19, 1990 from Diernisse to Magistrate Eagan 93(2)

Appendix N Letter of January 30, 1990 from Yavner to Magistrate Eagan 96(2)

Appendix O Answer to Substituted Complaint 100(2)

Appendix P Letter of November 26, 1980 from Diernisse to Naturman 103(2)

Appendix Q Answer, Affirmative Defenses and Counterclaims 105(2)

Appendix R Memorandum of Law of Defendants for Mediation Panel 118(2)

Appendix S Deposition of Louis Naturman 123(2)

Appendix T Statutes and Constitution. 130(2)

APPENDIX A

U.S. Court of Appeals for the Second Circuit.

Granting of Motion for Dismissal of Appeal by Appelles.

Case No. 91-7751

Ordered and filed August 27, 1991.

Order. It is hereby ordered that the motion be and it hereby is granted.

Signed. Richard J. Cardamone, Roger J. Miner, John M. Walker Jr.

APPENDIX B

U.S. District Court, District of Connecticut.

Decision of Mediation Panel Adopted by the District Court.

Civil No. B-84-44. (EBB)

Filed June 20, 1991.

In accordance with the Mediation Panel Order of United States Magistrate F. Owen Eagan, dated January 13, 1991, the undersigned heard the presentations of the parties on May 21 and June 5, 1991, and answer questions submitted by the parties, as amended, as set out below.

Amendments submitted by the parties are to Questions 2., 6., 7a. (new), 17a (new) and 18.G. and H., 20, 21, 22, and 23 (all new, but drafted by the Panel).

The answers represent the unanimous determinations of the mediation panel.

1. Are the copyright rights in defendants BBC's publications P-049 and P-034R,

owned by plaintiff, defendant BCC or defendant BCC and plaintiff jointly?

Answer: P-049 - Plaintiff

P-034R - Jointly

2. If the answer to 1 above is "plaintiff," did defendants infringe plaintiff's copyrights in P-049 and P-034R by any other publication?

Answer: Yes, by P-079 only.

A. Notwithstanding whether the answer to 2 above is yes or no, is plaintiff's claim for relief barred by 17 U.S.C. § 507(b)?

Answer: No.

B. Notwithstanding whether the answer to 2 above is yes or no, has the plaintiff by his conduct waived his right to enforce copyrights, and/or has he estopped himself?

Answer: No.

C. Notwithstandingh whether the answer to 2 above is yes or no, has the plain-

tiff been barred by laches for his delay in presenting his claim?

Answer: No.

D. Notwithstanding whether the answer to 2 above is yes or no, is plaintiff guilty of "unclean hands" with respect to all of the claims of his complaint and or/substituted complaint?

Answer: No.

3. If plaintiff did not own the copyrights, did the defendant own them under the work for hire doctrine?

Answer: Not applicable.

4. If the defendant originally owned the copyrights, did the plaintiff become the owner due to the defendant,s material breach of contract?

Answer: Not applicable.

5. Did the defendant slander and/or libel the plaintiff?

Answer: No.

6. Did the defendant engage in unfair

competition against the plaintiff?

Answer: No.

7 Were plaintiff's contributions to P-049 and P-034R sufficiently original to warrant copyright protecion?

Answer: Yes.

7a. Were defendant's contributions to P-049 and P-034R sufficiently original to warrant copyright protection?

Answer: Yes as to P-034R; no as to P-049.

8. Did plaintiff abandon or forfeit his copyright protection by failure to publish P-049 and P-034R with a proper copyright notice?

Answer: No.

9. Did plaintiff give up his right to statutory damages by failing to register claims of copyright within three months of publication of P-049 or P-034R?

Answer: Not applicable to claimed infringements by P-049 and P-034R.

Plaintiff registered his claim in P-049 prior to the infringement by P-079.

10. Were P-049 and P-34R derived by plaintiff from previous publications of BCC, such as P-033R and P-034R?

Answer: Not relevant to issues in case.

11. Did plaintiff commit fraud in obtaining his copyright registrations for P-049 and P-034R, by stating in his copyright registration applications:

A publication date 8 months earlier than publication actually occurred for P-034R

or that no previous registration for publication had been received by anyone, whereas, in fact, plaintiff knew that defendant BCC had previously registered copyrights in such publications?

Answer: No.

12. Were BCC's contributions to P-049 and P-034R sufficient to qualify BCC for joint authorship with plaintiff?

Answer: No, as to P-049; es, as to P-034R.

13. Did plaintiff breach its contract with defendant BCC on a publication titled "Retort Pouch"?

Answer: Yes.

14. If the answer to 13 above is "yes," what damages are owing from plaintiff to defendant BCC?

Answer: $3115.05, the expected profit plus $3500. publicity expense incurred, and $320.21, Expenses Paid, or a total of $6,935.26.

15. Did the defendant b each any of the following oral contracts, and if so, when?

A. Forming I

Anwer: Yes, November 26, 1980.

B. Food Packaging

Answer: Yes, November 26, 1980.

C. Retort

Answer: No

16. Did the defendant cause the plaintiff emotional distress?

Answer: No

17. Were the defendants' acts willful, malicious or in bad faith?

Answer: No

17a. Were the plaintiff's acts willful, malicious or in bad faith?

Answer: no

18. Is the plaintiff entitled to any of the following:

A. Restitution damages?

Answer: No.

B. Compensatory damages?

Answer: Yes.

C. Punitive damages?

Answer: No.

D. Defendant's profits?

Answer: Yes. Parenthetically, it is our opinion that if plaintiff were entitled to statutory damages, those damages would not have exceeded those awarded as

actual damages.

E. Costs?

Answer: no.

F. Interest?

Answer Yes.

G. Injunction?

Answer: No.

H. Other equitable relief?

Answer: No.

19. If so, which one and how much?

18.B. Answer: $3,394.35 on unpaid royalties on P-034R and P-049.

18.D. Answer: $2,743.75, defendant's profits on P-079 attributable to the infringement of P-049 (25%).

18.F. Answer: Interest on $3394:35 from November 26, 1980 at 8% per annum to September 30, 1983; and at 10% per annum from and after October 1, 1983 to the date of this finding. See Connecticut General Statute § 37-3a, and §Lodges 743 and 1746, etc. v. United Aircraft,§ 534 F.

2d 422, 446 (CA. 2, 1975). (See also 28 U.S.C. § 1961 as to postjudgment interest). The total is $3343.74.

Interest on $2743.75 at 10% per annum, from April 13, 1984, to the date of this finding. The total is $1970.16. Grand total is $5313.90.

20. Did the defendant breach any trust to the plaintiff?

Answer: No.

21. Is the defendant entitled to any of the following:

A. Restitution damages?

Answer: No.

B. Compensatory damages?

Answer: Yes.

C. Punitive damages?

Answer: No.

D. Plaintiff's profits?

Answer: No.

E. Costs?

Answer: No.

F. Interest?

Answer: Yes.

G. Injunction?

Answer: No.

H. Other equitable relief?

Answer: No.

22. If so, which one and how much?

21.B. Answer: See Answer to Question 14.

21.F. Answer: Interest from January 1, 1983, a point midway in the sales period 1981-1985, inclusive, to September 30, 1983, at 8% per annum; and at 10% per annum from and after October 1, 1983 to the date of this finding. The total is $5767.71.

SUMMARY OF DAMAGES

Due Plaintiff:

Damages	$ 6,138.10
Interest	$ 5,313.90
	$11,452.00

Due Defendant:

Damages	$ 6,935.26
Interest	$ 5,767.71
	$12,702.97

Net due Defendant: $1,250.97

Mediation Panel:

Signed Edwin Komen, Lewis Kurlantzick, J. Read Murphy

Appoved: F. Owen Eagan, United States Magistrate Judge

So Ordered: Ellen Bree Burns, Chief Judge

APPENDIX C

U.S. District Court, District of Connecticut

Denial of Omnibus Motion

Civil B-84-44 (EBB)

Ordered and filed May 14, 1991

Omnibus Motion

Plaintiff respectfully asks the Court to grant the following:

1. An order to Defendants not to introduce any issue, which they have not claimed in their Answer to Substituted Complaint of May 20, 1988.

2. Permission to Plaintiff to introduce into evidence his exhibit 24, Proposed Ruling on Motion for Preliminary Injunction, dated September 3, 1985 (Accepted and ordered on September 24, 1985).

3. Reconsideration of the Court's Ruling at the hearing on April 15, 1991, and dismissal of Defendants' counter-

claim.

4 An order precluding Defendants from amending their claim of damages from their claim of November 7, 1989, filed in compliance with the Court Order of October 31, 1989.

5. Permission to Plaintiff to claim damages under F.R.C.P. Rule 11 and 28 U.S.C. § 1927.

May 14, 1991

Requests 1 through 4 are denied. Request No. 5 is denied without prejudice. See oral ruling in open court on May 13, 1991.

Signed F. Owen Eagan, United States Magistrate Judge

APPENDIX D

U.S. District Court, District of Connecticut

Scheduling Order

Civil No. B-84-44 (EBB)

Ordered and filed May 13, 1988

Scheduling Order

The scheduling order in the above-captioned case is revised as follows:

Defendant Louis Naturman shall file an answer to the substitued complaint within twenty days of the date of this order

Defendant Business Communcations Co., Inc. shall file an answer to the substituted complaint whin twenty days of the date of this order.

Discovery shall be completed by August 12, 1988.

Dispositive motions shall be filed by September 12, 1988.

So ordered.

Signed Ellen Bree Burns, United States

District Judge

Dated at New Haven, Connecticut, this 13th day of May, 1988.

APPENDIX E

U.S. District Court, District of Connecticut

Omnibus Ruling

Civil No. B-84-44 (EBB)

Ordered and filed May 13, 1988

Omnibus Ruling

On December 1, 1987, the court heard oral argument on several pending motions in the above-captioned action. Plaintiff was ordered to submit a status report concerning outstanding discovery motions. This report was submitted, and the parties have both submitted reply letters. This ruling addresses each outstanding motion.

Ruling on Plaintiff's Motion for Summary Judgment

In 1979, plaintiff orally contracted with defendant Business Communications Co., Inc. ("BCC"), to provide two technical reports. BCC was to publish and sell

these reports and pay royalties to plaintiff. The works are entitled Plastics in Forming: New Technology, New Economics, New Potential ("Forming I") and Plastics in Food Packaging ("Food Packaging I"). BCC claims that it obtained copyrights on these works in 1980, and indicated such on all published copies. Relations between the parties deteriorated over circumstances involving a third report, The Retort Pouch: What's Happening? ("Retort Pouch"). This affected their arrangement involving the first two reports when defendants withheld royalties. In December, 1983, Plaintiff filed copyright applications for Forming I and Food Packaging I, and now claims sole ownership of these exclusive copyrights.

Plaintiff filed this suit in January, 1984. His substituted complaint, filed February 18, 1986, sounds in seven counts. Counts one and three state

copyright infringement claims with respect to Forming I and Food Packaging I, counts two and four state breach of contract claims predicated on defendants' withholding of royalties due on these reports, count five states a slander of title claim, and count six states a Connecticut Unfair Trade Practices Act ("CUPTA") claim. In count seven, plaintiff seeks to hold Mr. and Mrs. Naturman, the owners of BCC, personally liable on the copyright infringement counts.

In his motion for summary judgment, plaintiff seeks to establish defendants' liability on all seven counts. He further requests that the court deem defendants' conduct regarding the oral contracts to constitute a repudiation. Plaintiff also seeks summary judgment on defendants' counterclaims. Defendants are seeking a declaratory judgment holding that BCC is the sole owner of the

copyrights to Forming I and Food Packaging I. They also seek damages attributable to plaintiff's allegedly improper copyright registrations. In the second count, defendants claim that plaintiff breached the contract for Retort Pouch, and they seek damages.

For the following reasons, plaintiff's motion for partial summary judgment is denied.

A. Counts one and Three

Plaintiff argues that he is the owner of the copyrights to Forming I and Food Packaging I by virtue of a ruling issued by Magistrate Smith. Motion for Partial Summary Judgment at 11. On September 3, 1985, plaintiff obtained a preliminary injunction restraining defendants from selling or distributing Forming I and Food Packaging I or any derivative works. This court appproved and adopted the ruling on September 25, 1985.

Plaintiff's reliance on this ruling is erroneous. "(T)he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at a trial on the merits...." University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). See also Hamilton Watch Co. v. Benrus Watch Co., 206 F. 2d 738, 742 (2d Cir. 1953). Although evidence received at a Rule 65(a) hearing is admissible at trial, "finding of fact made after a hearing on the application for a preliminary injunction... cannot be used to ground a motion for summary judgment when they resolve contested issues of fact." 7 J. Moore, Moore's Federal Practice paragraph 65.04(5), at 65-96 (2d ed. 1987).

In the instant case, plaintiff and BCC both claim to own exclusive copyrights to Forming I and Food Packaging I. The record, as it presently exists, is not

dispositive of this issue. As the court finds that this is a "genuine issue (of) material fact," see Rule 56(c), Fed. R. Civ. P., summary judgement is inappropriate and is denied.

B. Counts Two and Four

Plaintiff claims that defendants breached a contractual commitment to account and to pay royalties for sales of Forming I and Food Packaging I. In his brief, plaintiff contends that this conduct constitutes a repudiation of the contracts, entitling him to rescind the contracts and to obtain copyright damages. Motion for Summary Judgment at 13. In Mr. Naturman's declaration, however, he claims that BCC provided plaintiff with accountings. Paragraph 9. He further acknowledges that defendants had a royalty obligation to plaintiff. Id t paragraph 8. Based on the dispute over the Retort Pouch report, however, he contends

that they " attempted to offset our losses by applying a portion of his royalties to his outstanding debt to us." Id. Plaintiff claims that the unpaid royalties amount to almost $7,200, Motion for Summary Judgment at 13, while defendants suggest a figure of half that amount, approximately $3,100, Decl. of L. Naturman paragraph 8.

The record is not sufficient for the court to grant summary judgment. Although the parties agree that royalties were withheld for Forming I and Food Packaging I, they disagree as to the justification, if any, for defendants' conduct. The court concludes that there remains a genuine dispute regarding the terms of the royalty arrangement in the parties' oral contractual relationship. The factual issue of what relationship, if any, Retort Pouch had to Forming I and Food Packaging I remains unresolved. Nor

is this court willing to hold, as a matter of law, that defendants' conduct constituted a repudiation of the contracts. Plaintiff's motion for summary judgment on counts two and four is denied.

C. Counts Five and Six

Plaintiff's motion for summary judgment on these state-law claims is derivative of the copyright claims in counts one and three. Because the issue of copyright ownership is central to both claims, and because this issue remains unresolved, summary judgment on counts five and six is denied.

Ruling on Defendant's motion for Summary Judgment

Defendant Elaine Naturman seeks dismissal of count seven of plaintiff's action. In that count, plaintiff alleges that, due to Mr. and Mrs. Naturman's ownership and operation of Business

Communications Co., Inc. (BCC), the corporate defendant, they are personally liable for damages, if any, awarded to plaintiff for his copyright infringement claims (counts one and three). See Substituted Complaint Count Seven paragraphs 2, 3.

Mrs. Naturman contends that, under copyright law, the test of personal liability "is whether the individual defendant has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." Memorandum at 2-3 (Jul. 24, 1987). The court concurs. plaintiff must either show that the individual defendant personally participated in the acts constituting an infringement or that she had the right and ability to supervise the infringing conduct, as well as a direct financial interest in such activity. Lottie Joplin

Thomas Trust v. Crown Publishers, Inc.,456 F. Supp. 531, 537 (S.D.N.Y. 1977), aff'd 592 F.2d 651 (2d Cir. 1978). See also Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (individual liability depends on status as "vicarious" infringer, i.e.,supervising the infringing activities and a direct financial interest therein, or a " contributory" infringer, i.e., one who, with knowledge of infringing activities, induces, causes, or materially contributes to the infringing activities).

In her motion for summary judgment, Mrs. Naturman acknowledges that she is an officer on the corporation's books. Her role has been confined, however, to part-time bookkeeping and other clerical duties. Declaration of Elaine Naturman paragraph 2. Mrs. Naturman claims that she exercises no managerial or superviso-

ry authority at BCC, and that she does not participate in the company,s operations involving its writers or its written products. Id. Paragraphs 3, 4. Moreover, she disavows any communications with plaintiff. Id. paragraph 5.

The complaint is silent as to particularized activity on Mrs. Naturtman´s part. In his motion for partial summary judgment, plaintiff contends tha because Mr. and Mrs. Naturman are BCC´s sold (sic) shareholders, directors, and officers, they are the "sole beneficiaries of the corporation´s profits." Id. at 23-24. According to plaintiff, this "direct financial interest" in the allegedly infringing activities, coupled with their "activities and participation," serve as the basis for individual liability. Id. at 23 (relying on Lottie Joplin Thomas Trust, supra, 456 F. Supp. at 537). He claims that Mrs. Naturman is a BCC policy

maker, id. at 24, and that she served as BCC's bookkeeper, among other capacities, id. at 23.

The evidence does not implicate Mrs. Naturman as either a vicarious or a contributory infringer. Plaintiff's evidence suggesting that Mrs. Naturman had any operational involvement in BCC's business, other than her clerical role, is ambiguous at best. The following colloquy occurred between plaintiff's counsel and Mr. Naturman during Mr. Naturman's deposition.

Q And then all of the directors and the policy makers and the other supervisors were you and your wife?

A No, that is not correct.

****

Q Are there any other policy makers?

A Yes.

Q Who are they/

A whoever is employed at that time in

a position to be a policy maker. An employee with a position of authority would be a policy maker.

Q How many people are currently in those positions?

A Three

Q What are their names, please?

A Peter Mooney ... Mehrnoz Rubin ... Phil Rotheim. Defendants' Motion for Sanctions (letter dated Oct. 7, 1987) (excerpts from Dep. of L. Naturman at 4-5). Plaintiff interprets this conversation to suggest that there were three policy makers in addition to Mr. and Mrs. Naturman. Mr. Naturman expressly challeges this interpretation, claiming under oath that

> As I stated on page 5, however, I identified three other individuals as having such a policy-making position. This list was to be in addition to myself. My wife was not intended to be included in such a listing and is accordingly wrongfully so identified by plaintiff.
> Declaration of L. Naturman at para-

graph 12.

Even resolving this disputed fact in plaintiff's favor, for purposes of deciding this motion, plaintiff's claims must fail. "Courts have rarely imposed liabiligy on a corporate officer for the infringing acts of the corporation without some inquiry into either the officer's actual participation, or, at the very least, into the nature if his function within the corporation." Rohauer v. Killiam Shows, Inc., 379 F. Supp. 723, 729 (S.D.N.Y. 1974), rev'd on other grounds, 551 F.2d 484 (2d Cir.), cert. denied, 431 U.S. 949 (1977).

It is uncontested that Mrs. Naturman's functions at BCC involved part-time bookkeeping and clerical work. There is no evidence that she knew of and participated in the allegedly infringing activities of BCC. The court holds, therefore, that she cannot be held liable as a

contributory infringer. Nor can she be held liable under a vicarious infringement theory. Plaintiff's claim that she is a policy maker is speculative and undefined. Indeed, the only definition for the term, offered by Mr. Naturman in his deposition, excludes Mrs. Naturman. See supra ("An employee with a position of authority would be a policy maker."). Such a "meager factual record" is an insufficient basis upon which to predcicate personal liability for Mrs. Naturman. See Rohauer, supra, 379 F. Supp. at 729 Cf. RSO Recors, Inc. v. Peri, 596 F. Supp. 849, 858 (S.D.N.Y. 1984) (individual liability supported by evidence indication that Peri was personally involved in all aspects of the infringing activity); Boz Scaggs Music v. KND Corp., 491 F. Supp. 908, 913 (D. Conn. 1980) (vice president and general manager of radio station personally liable because he

supervised and controlled daily operations).

Accordingly, the defendant Mrs. Naturman's motion for summary judgment is granted and she is dismissed from this case.

Ruling on Defendants' Motion for posting of Bond or Termination of Preliminary Injunction

On September 3, 1985, plaintiff obtained a preliminary injunction from Magistrate Smith, which this court adopted and approved on September 25, 19985. No security was required of plaintiff at that time. Plaintiff contends, and defendants do not dispute, that no bond was requested; neither did the defendants file an objection with this court or seek appellate court review of the ruling.

On May 14, 1987, defendants moved for relief, seeking either the imposition of a bond requirement or termination of the

preliminary injunction. Plaintiff responded in November 1987, and oral argument was held on December 1, 1987. For the following reasons, defendants' motion is granted in part and denied in part.

Discussion

The preliminary injunction was predicated on a single stipulated issue: "whether there was such an exercise of supervision and control by the defendant that plaintiff is not an independent contractor." Proposed Ruling on Motion for Preliminary Injunction ("Ruling") at 2. Magistrate Smith concluded that plaintiff was an independent contractor " and that Diernisse -- not BCC or its employees ... -- is the author and artistic creator of the subject works." Id. The preliminary injunction that issued

> restrain(ed) the defendants, its agents, servants and employees and all persons acting in concert with them from distributing, publishing and selling copies of the books Plastics

Forming and Plastics in Food Packaging or any works derived therefrom.[1] In addition, defendant should be restrained from holding itself out as the copyright owner of those works and from doing any act inconsistent with the plaintiff's ownership of these copyrights.

Id. at 16-17. The Ruling is silent on the issue of a bond requirements.

In their brief, defendants argue that plaintiff should post a bond adequate to cover ther losses stemming from the inability to sell previously copyrighted works and any derivative works. In the alternative, they seek the termination of the prelilminary injunction, contending that the failure of the court to consider the posting of a bond renders the injunction imprope.

A. Propriety of the Preliminary Injunction

Rule 65(c) states that "(n)o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in

such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Rule 65(c), Fed. R. Civ. P. Despite the compulsory language in Rule 65(c), it generally is conceded that the question of whether any security is required, as well as the amount of security, falls within the discretion of the court. See 7 J. Moore, Moore's Federal Practice paragraph 65.09, at 65-120 (2d ed. 1987). In the Second Circuit, the court may dispense with security absent a showing of likelihood of harm to the enjoined party. International Controls Corp. v. Vesco, 490 F.2d 1334, 1356 (2d Cir.) ("especially in view of the phrase -- 'as the court deems proper'"), cert. denied, 417 U.S. 932 (1974); Ferguson v. Tabah, 288 F.2d 665, 675 (2d Cir. 1961).

Defendants ague that the failure of the court expressly to consider the issue of security renders the injunction improper. Memorandum at 4. See, e.g., Roth v. Bank of the Commonwealth, 583 F.2d 527, 539 (6th Cir. 1978), cert. dismissed 442 U.S. 925 (1979); System Operation, Inc. v. Scientific Games Development Corp., 555 F.2d 1131, 1145 (3d Cir. 1977); 7 Moore's Federal Practice, supra, paragraph 65.09, at 65-122 (noting Roth). This is not a uniform holding. See, e.g., Continntal Oil Co. v. Frontier Ref. Co., 338 F.2d 780, 782 (10th Cir. 1964). Nor is it so in the Second Circuit. See, e.g., Clarkson Co., Ltd. v. Shaheen, 544 F.2d 624, 632 (2d Cir. 1976)("Because no request for a bond was ever made in the district court, and because under Fed. R. Civ. P. 65, the amount of any bond to be given upon the issuance of a preliminary injunction

rests within the sound discretion of the the trial court, the district court may dispense with the filing of a bond."). The court holds, therefore, that the absence of express consideration of Rule 65(c) in the ruling does not provide the grounds for termination the preliminary injunction or for voiding it ab initio. Defendants' motion predicated on this argument is denied.

B. Necessity for a Bond

A preliminary injunction is an interlocutory order, and is subject to the court's plenary power to revise it. 7 Moore's Federal Practice, supra, paragraph 65.07. at 65-115.

If defendants can demonstrate that they are or will be harmed by the preliminary injunction, a bond is appropriate. City of Hartford v. Hills, 408 F. Supp. 879, 887 D. Conn. 1975). In their brief, defendants argue that

> (by virtue of the entry of the preliminaary injunction, BCC has been precluded from offering for sale or selling its previously- copyrighted works which correspond the subject matter of Mr. Diernisse's copyrights, and has further been precluded from offering for sale or selling subsequent works which utilize such material. Accordingly BCC has been deprived of, and will continue to be deprived of the use of material which it believes it to have rights to.. This has caused and will continue to cause tangible economic injury to BCC. Memorandum at 3.

Plaintiff argues that defendants have not demonstrated any economic harm.[2]. He points out that "(m)ore than six years have elapsed since the publication of Forming I and Food Packaging I, and more than two and one-half years have elapsed since the publication of Formng II." Opposition Memorandum at 8. Moreover, based on an average shelf life of one and one-half years, plaintiff argues that no such economic harm can be asserted at this late date.

The court concurs with defendants'

interpretation of the preliminary injunction. The sale of Forming I and Food Packaging I was prohibited, as well as that of any derivative works. Should defendantys succeed on the merits of this action, the limited shelf life of these works may limit the amount of losses, not whether any such losses were incurred. Yet defendants' only attempt to quantify these losses is to suggest an amount of $52,000, "based upon plaintiff's claim of defendants' wrongful profits of that magnitude." Reply memorandum at 5. The court can find no specific or itemized damages claim by the plaintiff, other than his jurisdictional statement that the amount in controversy exceeds $10,000. As the court understands his claim, however, he seeks recompense for infringements that have already occurred. To the extent that he also claims damages on " lost sales," no evidence on the

record exists in order to quantify the claim. The court declines, therefore, to use the $52,000 figure. Given the protracted nature of this litigation, howver, the court will impose a bond requirement of $1,000. This should cover costs should the preliminary injunction be found to have been improvidently granted. Plaintiff shall post a $1,000 bond within thirty days of this ruling.

Ruling on Plaintiff's Second Motion for Contempt

In his second motion for contempt, plaintiff seeks several forms of relief. His brief addresses five issues.

(1) Defendants' Contempt of Preliminary Injunction

(2) Defendants' Contempt of the Discovery Process

(3) Dismissal of Defendants' Counterclaim

(4) Defendants' Willful Infringements

in Forming I, Food Packaging I, and Forming II

(5) Defendants' Willful Infringements in Books Sought in Order of April 29, 1986 to Compel Production of Documents.

Plaintiff's motion is denied for the following reasons.

A. Contempt of Preliminary Injunction

Plaintiff claims that defendants violated the preliminary injunction by offering two of the contested works for sale in December, 1985 (Food Packaging I and Forming II). The injunction, effective September 25, 1985, prohibited the sale of these works, as well as any conduct "inconsistent with the plaintiff's ownership of these copyrights." Proposed Ruling on Motion for Preliminary Injunction at 16-17.

Plaintiff's evidence, introduced at oral argument on December, 1987, is insufficient to establish that such an

offer was made. Moreover, no evidence was introduced to suggest that sales of these works continued after September 25, 1985. indeed, in his objection to defendants´ motion for posting of bond or termination of preliminary injunction, plaintiff argued that BCC is free to publish and sell Food Packaging I, as long as it doesn´t claim a copyright, but that it cannot sell Forming II. See Brief in Opposition to Defendants´ Motion for Posting of Bond at 7-8 (Nov. 4, 1987). The court questions this interpretation of the ruling. See Ruling on Defendants´ Motion for Posting of Bond or Termination of Preliminary Injunction n.2. It suggests, however, that as long as two years after the injunction entered, grounds exist for legitimate diffences on what conduct it proscribed. The plaintiff´s motion is denied.

B. Contempt of Discovery Process

Plaintff makes several claims of discovery obstruction, from delay and production of partial responses to ignoiring requests and reneging on agreements. plaintiff has compiled a list of "items sought in discovery and not yet produced by defendants." The list was discussed at oral argument on December 1, 1987, when plaintiff was ordered to submit an updated report to the court. He did so on January 14, 1988, and defendants responded in a letter dated January 26, 1988. The court will address each item, seriatim.

1. Cash Receipt Journal

Plaintiff performed a partial review of this information during his examination of BCC's Businees records at their premises in October, 1987. The court orders that the inspection continue, and defendants shall provide this information for the period 1980-1987, inclusive, and

designate it as such to plaintiff. The court notes, parenthetically, that inspection during business hours at BCC's premises, commencing at 10:00 a.m., is reasonable. The parties obviously may create other arrrangements, should they agree to do so.

2. Names and adresses of employees and ex-employees who have kept records and/or had contact with customers and the Register of Copyrights

Defendants provided two names, Louis Naturman (owner and operator of BCC), and Delores Violette (an eight-year employee). This, apparently, does not satisfy plaintiff. The court cannot intercede based on the request as posed. It is a compound question directed at eliciting several pieces of information. Plaintiff shall reformulate and redirect his questions to defendant with appropriate notice to the court. See Local Rule

9(d)(2). Defendants shall object or respond. See id. Rule 9(d)(3). Should plaintiff then wish the court to intercede, he must comply with local Rules 9(d)(4) and 9(d)(5).

3. True and accurate accounting of monies due plaintiff. This would include dates, reasons why money was due; and if royalties, name and address of customer, name of person who purchased, invoice number and amount, and amount paid

Plaintiff contends that this item has never been furnished. Defendants claim that it can be gleaned from plaintiff's examination of their business records. They further argue that they do not owe plaintiff an accounting.

Although Rule 33(c), Fed. R. Civ. P., allows defendants to make available BCC's business records as an answer to an interrrogatory, the rule does impose a specification requirement. The specifi-

cation "shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained." Defendants have offered for examination record cards, shipping records and books of account relating to sales, substantiated by looseleaf royalty record pages and other forms of records. plaintiff claims that a complete record cannot be constructed from the furnished information.

The court concurs with defendants that they are not obliged to provide plaintiff with an accounting. They are obligated, however, to provide complete reords. The court intimates no view as to whether the documents provided adequately answer plaintiff's inquiry. Defendants shall provide plaintiff with written instructions indicating how the documents interrelate and how to determine sales figures

for the allegedly infringing materials. A copy of these instructions shall be filed with the court. See Local Rule 9(d)(3).

Inquiries with date, company name and address, and inquirer's name

Plaintiff claims this was never provided; defendants claim that it was. Defendants shall file a written response with the court, pursuant to Local Rule 9(d)(3). Should plaintiff wish to challenge the suffiency of the response, he must comply with Local Rules 9(d)(4) and 9(d)(5).

5. Accounts receivable journal or cards

Defendants stated at oral argument that there is no account receivable journal. Plaintiff shall have access tro the cards when his examination of BCC's business records continues. Defendantss shall label or otherwise earmark the

cards. Should Defendants chose to provide copies in lieu of examination, they shall have thirty days from the date of this ruling within which to do so. Compliance must be indicated to the court, pursuant to Local Rule 9(d)(3).

6. Customer purchase orders .

Same as item 5.

7. Invoices after January 1, 1980

Same as item 5.

8. Books listed in order to compel, dated April 29, 1986

Same as item 5. See also Ruling on Motion for Protective Order (April 29, 1988).

9. Catalogues after January 1, 1984

Defendants contend that they have supplied this information, although no compliance was recorded with the court, pursuant to Local Rule 9(d)(3). Copies of the catalogues shall be provided to plaintiff within thirty days of the date

of this ruling, with compliance noted on the record, pursuant to Local Rule 9(d)(3).

10. Index cards from BCC's files

Sme (sic) as item 5.

11. Written Record of Items Produced

Defendants filed a notice of compliance in response to plaintiff's first set of interrogatories and requests for production on April 10, 1984. No other such notice is on the record. The defendants shall file such notice as directed for each of the items resolved in this ruling. Unless plaintiff indicates to the contrary within thirty day of the date of this ruling, the court shall assume, and defendants may proceed on the basis, that defendants are in complance with plaintiff's discovery requests, other than those discussed in this ruling.

12. Affidavits that a copy of the

preliminary injunction, dated September, 1985, has been distributed to all employees, the date of distribution, and the name and adresses of the employees

The preliminary injunction, as entered and as now modified, is valid. See Ruling on Defendants' Motion for Posting of Bond or Termination of Preliminary Injunction. The injunction had no provision ordering defendants to distribute a copy to each BCC employee, so the court cannot determine a basis for ordering defendants to attest to such in an affidavit. Plaintiff's discussion in his January 14, 1988, status report, does not state where on the record, authority for this request lies. Should plaintiff wish to pose interrogatories that elicit information concerning defendants' means of compliance with the preliminary injunction, he may do so. Absent such inquiries or an order from the court,

defendants need not provide the affidavit as requested.

13. Legible translation of information on looseleaf sheets (royalty sheets) produced July 14, 1986

This appears to have been furnished. Defendants shall record their compliance with the court, pursuant to Local Rule 9(d)(3). Contempt is not an appropriate vehicle to address plaintiff's inability to reconcile the figures with others gleaned from his examination of BCC's business records. Should plaintiff have questions either beore or after his continued examination, he may direct them to defendants, pursuant to Rules 33, or 36, Fed. R. Civ. P., and Local Rule 9(d)(2).

14. All new information wich Defendants are required to produce. This includes all sales not previously reported, and addresses of Defendants who

have moved.

This information apparently has been supplied, and will be supplemented by plaintiff's continued examination of BCC's records. All parties are obliged to supplement their discovery responses to include information thereafter acquired. See Rule 26(e), Fed. R. Civ. P. The rule further provides that the "duty to supplement may be imposed by order of the cour, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses." Rule 26(e)(3), Fed. R. Civ. P. The court orders the parties to discuss supplementation and, if they cannot reach agreement, plaintiff is directed to make new requests.

15. Names and adresses of withnesses Defendants intend to call at trial

16 Documents Defendants intend to introuce at trial

Defendants claim they have not yet prepared this information. The information is discoverable. Because this case is now over four years old, defendants are directed to provide a response within thirty days of the date of this ruling. The answer may be supplemented prior to the completion of the discovery period.

17. Any other information relating to this action, which has not previously been produced

This request is overbroad. Should plaintiff wish to make further particularized inquiries, he man do so within the confines of the Federal Rules of Civil Procedure and the revised scheduling order.

C. Remaining Grounds

Plaintiff's additional grounds for seeking relief merit little consideration. He argues degendants' first counterclaim should be dismissed because it

was already resolved by the preliminary injunction ruling. The first count of the counterclaim seeks a declaration that BCC is the sole owner of the copyrights placed into issue by plaintiff, and seeks damages should defendants prevail. That plaintiff revailed on a preliminary injunctive basis, however, is not dispositive of this issue. See Ruling on Plaintiff's Motion for Partial Summary Judgment, supra. The second count of the counterclaim states a breach of contract action, to which plaintiff contends a thre-year statute of limitations appliies. Plaintiff errrs. See Conn. Gen. Stat. § 52-576(a) (six year statute of limitations for contract actions).

Plaintiff also seeks to have the court hold that defendants willfully infringed plaintiff's copyrights to Forming I, Food Packaging I, and Forming II. Because genuine issues of material fact remain

unresolved on this issue, judgment as a matter of law would be inappropriate. See Ruling on Plaintiff's Motion for Partial Summary Judgment, supra.

Plaintiff also seeks a determination that defendants willfully obstructed his ability to review the reports sought in his April 29, 1986 motion to compel. This issue was resolved with a protective order. See Ruling on Motion for Protective order, supra. See also supra, Item 8.

The court holds that none of the remaining grounds demonstrates a sufficient basis for imposing sanctions or for a finding of contempt. Plaintiff's motion is denied.

So ordered.

Signed Ellen Bree Burns, United States District Judge

Dated at New Haven, Connecticut, this 13th day of May, 1988.

Notes

1. The Magistrate found Forming II to be such a derivative work. Ruling at 16.

2. Plaintiff also argues that the defendants are not prohibited from selling Forming I and Food Packaging I. This position is not consistent with the language in the preliminary injunction ruling, which restrains the publishing and selling of these two works. See supra.

APPENDIX F

U.S. District Court, District of Connecticut

Denial of Motion for Production of Evidence and Compliance with Oral Court Order

No. Civil B-84-44 (EBB)

Ordered and filed February 20, 1991

April 24, 1990

Motion for production of Evidence and Compliance with Oral Court Order

Plaintiff respectfully request the Court to order the Defendants to:

1. Comply with the oral order issued by Magistrate Owen Eagan at the Settlement Conference on December 18, 1989, that they furnish the name, address, and Curriculum Vitae of their nominee to the arbitration panel.

2. Comply with the Court's standing Order for the Pretrial Memoranda, due

October 23, 1989, to furnishh items 11. Exhibits and 12. Deposition Testimony.

3. Furnish copies of the evidence in their possession as listed in item 11. of Plaintiff's Pretrial Memoranda of September 18, 1989.

February 20, 1991

Motion denied.

Signed F. Owen Eagan

United States Magistrate Judge

APPENDIX G

U.S. District Court, District of Connecticut

Ruling

No. Civil B-84-44 (EBB)

Ordered and filed October 31, 1989

Ruling

In furtherance of agreements made at the conference held on October, 1989, the court issues the following orders:

1. Plaintiff shall identify with particularity each element of damages alleged to have been caused by defendants. Plaintiff shall state both the amount he requests and how he calculated each figure.

2. Plaintiff shall state the legal theory upon which he relies for each element of damages. Plaintiff shall state the facts that support each legal theory.

3. Plaintiff shal identify and pro-

duce any records he has that establish, or tend to establish, the amount of the royalty deficiency. Plaintiff shall furnish to the defendants and the court information he claims to have previously disclosed regarding his claim for deficient royalty payments. The plaintiff may supplement any list, if necessary, to provide a full and accurate basis of proof for damages.

4. The plaintiff shall identify to the court the document in which he requested the dismissal of defendants' counterclaim. A copy of the docket sheet is enclosed to aid him in this task. Further disclosure regarding the Retort Pouch publication shall be held in abeyance pending receipt of plaintiff's response.

5. Defendants shall identify with particularity each element of damages alleged to have been caused by plaintiff.

Defendants shall state both the amount they request and how they calculated each figure.

The parties shall comply with this order on or before November 14, 1989, as agreed to at the conference.

So Ordered.

Signed Ellen Bree Burns, Chief Judge, United States District Court

Dated at New Haven, Connecticut, this 31st day of October, 1989.

There is no text on this page.
The text is continued in Appendices
No. 2

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

91-1115 (3)

Supreme Court, U.S.
FILED
JAN 2 1992
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

VILLY DIERNISSE - PETITIONER

VS.

BUSINESS COMMUNICATIONS COMPANY, INC.

and LOUIS NATURMAN RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI
APPENDICES No. 2

VILLY DIERNISSE, PRO SE

9 KAUFMAN DR.

WESTWOOD NJ 07675

(201) 664-6222

APPENDIX H

U.S. District Court, District of Connecticut

Proposed Ruling on Motion for Preliminary Injunction

No. Civil B-84-44 (EBB)

Proposed and filed September 3, 1985

Adopted and Ordered September 24, 1985, filed September 25, 1985

Proposed Ruling on Motion for Preliminary Injunction

Under Rule 65, F.R.Civ.P., plaintiff Diernisse, a professional writer, has moved for a preliminary injunction restraining defendant from distributing, publishing, or selling copies of two books or from doing any act inconsistent with plaintiff's claimed ownership of copyrights of these works. Injunctions in copyright infringement actions are authorized by the Copyright Act of 1976, 17 U.S.C. § 101 et seq. An evidentiary

hearing was held before the magistrate on August 8, 1985.

The parties have stipulated on the record that there is one controlling factual issue in this matter: whether there was such an exercise of supervision and control by the defendant that plaintiff is not an independent contractor. If there was such an exercise of supervision over the writing of the works in question, the injunction cannot issue. However, if the amount of control exercised was such that plaintiff was a truly independent contractor, the injuntion shall issue. For the reasons discussed below, the court finds that plaintiff Diernisse's relationship to the defendant was that of an independent contractor, that defendant did not significantly direct or supervise Diernisse's creation of the works in question, and that Diernisse--not BCC or its employees Natureman

and Bakker--is the author and artistic creator of the subject works. Accordingly, plaintiff's application should be granted.

I

Since about 1975 Villy Diernisse has made his living as a full time writer, self-publisher, and consultant. he has a degree in mechanicai engineering and writes articles on plastics, packaging, and other technical subjects; he often works on several articles simultaneously. At the injunction hearing, he testified that he works in his home in Westwood, New Jersey, where he maintains a fully equipped business office containing a library, typewriter and photocopier. He is a dues-paying member of several professional writer's organizations and subscribes to some two dozen technical periodicals, he maintains a separte business bank account for the proceeds

from his writing.

In June, 1979, plaintiff responded to an advertisement placed by defendant Business Communications Company ("BCC") of Stamford, Connecticut. The advertisement read as follows: "HELP WANTED!!! platics persons with organizational/ writing talent to research and author industry studies." Respondents were to contact Marilyn Bakker or Lou Naturman. plaintiff´s written response indicated that he possessed 25 years of experience in "all aspects of the plastics industry" and directed defendant´s attention to his most recent published article. plaintiff also stated in his letter that he had a library of published material dating from 1954 and that he did his own typing and submitted professional manuscripts. Diernisse met with Naturman, the president of BCC, and Bakker at defendant´s office in Stamford. At that meeting, it

was agreed that plaintiff would write the book Platics Forming.

It is undisputed that plaintiff was to be paid twice the purchase price of the book ($1500), his expenses, and a royalty on copies sold. Apparently there was no written contract. It is also undisputed that plaintiff had no prescribed working hours and that he was expected to work out of his home in New Jersey, although Naturman testified that there was space available in Stamford for plaintiff's work. No deductions were made by defendant for FICA or withholding taxes and plaintiff received no employee benefits from defendant. There is no dispute that plainfiff and Bakker, his editor, met infrequently and maintained telephone contact no more that 2 or 3 times per month.

The work itself was done in two or three stages, plaintiff sometimes sub-

mitting as much as 50 to 100 pages at a time. A second book, Food Packaging, was written under similar conditions. Plaintiff's name appears on the front cover of each work; Marilyn Bakker's name does not appear. On the cover of a sequel to Plastics Forming, Plastics Forming Dynamics and Trends ("Forming II"), the work plainfiff alleges is derived from his own, Dawood Ghavnave is designated as "project supervisor".

It is the nature of Bakker's involvement in plaintiff's work that the parties dispute. Diernisse credibly characterizes Bakker's work as that of a "very good editor": she did revisions, asked questions and made suggestions to improve the work. However she did not, plaintiff credibly asserts, instruct him as to scope or content of the books; the words and expression used were his own. According to plaintiff, only after all of

the books installments were received did Bakker critique plaintiff´s work.

In contrast, Bakker describes her involvement with plaintiff´s work as "constant supervision." She considered herself to be plaintiff´s project supervisor rather than merely his editor. Bakker herself has an undergraduate degree in bacteriology and a Master´s Degree in education. prior to her employment with the defendant, she was a freelance writer. Bakker testified that she received her training in plastics technology from Naturman, whose employ she left in 1981. Bakker asserts that she "constantly " passed judgment on points made by the plaintiff and that Naturman sometimes had to be called in to "mediate". She testified to having had many disagreements with the plaintiff on methodology. Nevertheless, Bakker agreed that her telephonic contact with plain-

tiff was no more than twice a month; she stated she could not recall how often they had met in person. The completed work, she maintains, follows the general formal characteristic of defendant's publications.

Similarly, Louis Naturman testified that all of this company's technical studies follow the same general format. However, he testified that these works may be written either by staff writers or by contractors. He noted that the plaintiff make the day-to-day decisions about the ongoing work and that it was submitted in stages. Naturman expected that the plaintiff would do the work in his home. Some changes, he indicated were made in the books as a result of discussions with plaintiff. Naturman testified that there was "no difference" between a project supervisor and an editor. Nevertheless, Naturman stated that Bakker was

not the project supervisor on plaintiff's books; the "person who does most of the writing" is the one whose name appears on the cover. He stated that plaintiff was given the ground rules regarding the boo's form but not the specifics. Nevertheless, Naturman testified that Bakker had "supervised" the plaintiff's writing of both books.

II

As the parties agree, the pivotal issue here is whether or not plaintiff should be characterized as an independent contractor. His characterization is important since it determines in the circumstances of this case whether there has been a triggering of the "work for hire" doctrine under copyright law. According to this doctrine, an employer for whom work is done owns the copyright if certain conditions are met. Critical to this detemination is whether an ex-

press contract exists making the work one "for Hire", especially one restricting the author's freedom to engage in other writing activities for hire, whether regular working hours were maintained and whether the creative work occurred at the employer's place of business. Quinto v. Legal Times of Washington, Inc. 506 F. Supp. 554, 558 (D.D.C. 1981).

Work subject to this analysis include:

> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test or as an atlas.... 17 U.S.C. PQ 101(2).

Given the seeming inapplicability of these criteria to the plaintiff's situation, i.e., the absence of a written agreement and the nature of the books produced, the work for hire doctrine would appear inapposite but for a recent decision in this circuit, Aldon Accessories, Ltd. v. Spiegel,

Inc., 738 F.2d 548 (2d Cir. 1984).

In Aldon, the Second Circuit found that statuettes commissioned by Aldon were works made for hire despite the absence of a written instrument and the nonpresence of the subject work among the enumerated categories appearing under § 101(2) of the Copyright Act. Accordingly then, as the parties have stipulated, the key issue is a determination of plaintiff's status as a truly independent contractor vel non. This status will determine the applicability of work for hire analysis as interpreted in the Aldon decision and affect the likelihood of plaintiff's success on the merits.

It is well established that an independent contractor is one who contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of the work. Darling v.

Burrone Bros., Inc.. 162 Conn. 187, 195 (1972). Accordingly, a critical factor in deciding whether an employee relationship exists is whether there has been an exercise of a right to control and supervise the manner in which the work is performed. Epoch Producing Corp. v. Killiam Shows, Inc., 552 F.2d 737, 734 (2d Cir. 1975), Cert. denied, 424 U.S. 955 (1976), cited in Aitken, Hazen, Hoffman, Etc. v. Empire Construction Co., 542 F. Supp. 252, 257 (D. Neb. 1982). Although the manner of payment is not decisive in determining independent contractor status, it is an important factor. Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640, 651 (S.D.N.Y. 1970).

In cases involving writers, the author's freedom to engage in outside writing activities from which he derives substantial independent income has been

held indicative of an absence of an employment for hire. See, e.g., Picture Music, Inc. v. Bourne, Inc., supra, 314 F. Supp. at 651, For example, in F.A.S. International, Inc. v. Reilly, 179 Conn. 507 (1980), a case under the Connecticut unemploument compensation statute, the Connecticut Supreme Court upheld a lower court decision that a number of part-time artists, writers and photographers were not employees. These individuals considered themselves to be independent contractors: they worked no regular hours, received no fringe benefits and had no Social Security or other taxes withheld from their paychecks. They performed their work in their homes and provided their own office space, equipment and supplies; they performed on or two assignments at a time and returned the work when completed. Moreover, they performed freelance work for other employers as

well. Id. at 509, 510.

III

Although the nature of the work performed by plaintiff in the present case differs somewhat from that of the writers in F.A.S. International, similarities in the manner of the work's performance and method of payment are significant. Also of some significance is the fact that Diernisse was clearly not considered an employee for tax and benefits purposes. It is undisputed that plaintiff performed the work in his home and was expected to do so. He used his own supplies and library of published material. He was not on the defendant's regular payroll but was to be paid on the basis of the completed work; twice thge purchase price plus royalties. Even the advertisement he answered southt persons to "author" industry studies.

Significantly, even though Marilyn

Bakker considered herself to be the "project supervisor" of the two works authored by the plaintiff, she is not so designated on the covers of plaintiff´s books, despite Naturman"s testimony that this was the usual practice of his company. Indeed, Naturman´s statements in this regard are somewhat contradictory; although he asserted that Bakker "supervised" plaintiff´s work, he indicated that Bakker was not the project supervisor. Moreover, such "supervision" admittedly did not take place on a day-to-day basis; plaintiff was responsible for the specifics of the work. Naturman´s statement that BCC publishes its studies through the use of either staff writers and contractors also is of some significance; if indeed, as defendant argues, plaintiff was not such a contractor why did defendant advertise for "authors" and designated plaintiff as such on the

covers of his books? From this combination of circumstances, the court is led to conclude that plaintiff was indeed a truly independent contractor.

The magistrate does not find Bakker´s conclusory statements with regard to her " supervisory" role persuasive. Although from her testimony on her bakground in working with technical subjects Bakker is clearly qualified to perform critical and rigorous editing, her testimony as to the type of "supervision" she rendered is not inconsistent with the role of a good editor. Were her suggestions for improvement to plaintiff´s work limited to grammatical construction and punctuation she might be considered a mere proofreader, not an editor. While the court does not profess extensive knowledge of the field of technical writing, it is logical to assume that editors in these areas possess specialized knowledge adequate to

permit them to render meaningful criticism. Indeed, as Bakker herself testified, she had asked Naturman to assign her to projects involving plastics so that she could become more specialized. Moreover, the fact that telephonic contact with plaintiff occurred only 2 or 3 times per month is inconsistent with Bakker's conclusory testimony regarding "constant supervision".

Seemingly, if Bakker's contacts with plaintiff were as significant and as fraught with dispute as Bakker asserts, the number of such contacts might be clearer in her mind, despite the passage of time. While the court does not doubt that Bakker believes herself to have exercised a substantial supervisory role in the completion of these books, it does not find Bakker's conclusions compelling or creditable in light of the other undisputed circumstances surrounding

plaintiff;s contractual arrangement with defendant.

IV

Given that the court concludes that Diernisse was an independent contractor, it remains to consider whether the recent interpretation of the work for hire doctrine presented in Aldon so affects the likelihood of the plaintiff´s sucess on the merits as to preclude the issuance of a preliminary injunction. It does not. The court finds that the facts in Aldon are distinguisable from those in the instant case.

Aldon did not involve a writer but artisans who were commisioned to make porcelain statuettes to be marketed by Aldon Accessories. Although the statues were to be designed by artists who were not regular employees of the accessories firm, the degree of supervision exercised by one of the firm´s principals differs

dramatically from that in the instant case. In Aldon, the principal supervised the project on a daily basis: models were prepared directly in front of him for hours at a time. As the Second Circuit observed, he "stood over the artists at critical stages of the process, telling them exactly what to do. He was in a very real sense, the artistic creator." Aldon v. Spiegel, supra, 738 F.2d at 550, 553.

This kind and quality of supervision is not fairly comparable to the degree of "control" purportedly exercised by Marilyn Bakker in her editing of plaintiff's work. Accordingly, Aldon does not preclude the issuance of a preliminary injunction.

V

The movant's burden in seeking a preliminary injuntion is well established. A dual showing must be made: 1)

the likelihood of success on the merits, and 2) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardship tipping decidedly in his favor. Coca-Cola Company v. Tropicana Products, Inc., 690 F.2d 312, 314-315 (2d Cir. 1982. Moreover, the plaintiff must show also that he is likely to suffer irreparable injury if the requested release is granted. Arrow United Industries v. Richards, 678 F.2d 410, 413-14 (2d Cir. 1982). A copyright holder may be presumed to suffer irreparable harm when the right to the exclusive use of the copyrighted material is invaded. Robert Stigwood Group v. Sperber, 457 F.2d 50, 55 (2d Cir. 1972).

In the instant case, the parties have stiplated that a finding that plaintiff was acting as a genuinely independent contractor should result in the issuance

of a preliminary injunction. Therefore, it is unnecessary for the court to undertake a detailed discussion of the standard for injunctive relief. Suffice it to say that the plaintiff, as the copyright holder of these works, may be deemed to suffer irreparable injury if these works or those allegedly derived from them continue to be distributed by defendant. Plaintiff has submitted materials which indicate a sufficiently close relationship between the works Plastics Forming and Forming II to demonstrate the likelihood of his success on the merits of this copyright infringement action. As between the parties, the balance of hardship tips decidedly in plaintiff's direction.

For all of the above reasons and for those appearing in plaintiff's meticulous memoranda, a preliminary injunction should issue restraining the defendant,

its agents, servants and employees and all persons acting in concert with them from distributin, publishing and selling copies of the books Plastics Forming and Plastics in Food Packaging or any works derived therefrom. In addition, defendant should be restrained from holding itself out as the copyright owner of those works and from doing any act inconsistent with the plaintiff's ownership of these copyrights.

The parties are free to seek timely review by the district judge pursuant to 28 U.S.C. §636 and the Local Rules. The parties are further directed fortwith to submit a joint proposed injunction order for the district judge's consideration and signature.

Dated at Bridgeport, Connecticut, this 3rd day of September, 1985.

Signed Thomas P. Smith. United States Magistrate

APPENDIX I.pa

U.S. District Court, District of Connecticut

Order of Preliminary Injunction

No. Civil B-84-44 (EBB)

Ordered September 24, 1985, filed September 25, 1985

Order of Preliminary Injunction

The Court, having reviewed the Proposed Ruling on Motion for Preliminary Injunction by Magistrate Thomas P. Smith, and dated September, 1985, hereby enters this Preliminary Injuntion restraining the Defendant, Business Communications Co., its agents, servants, and employees, and all persons acting in concert with them, from:

1. Publishing, distributing, preparing, or selling any derivative works of either Plastics Forming P-049 or Plastics in Food Packaging P-034;

2. Holding itself out as the copyright

owner of the copyrights in and to Plastics Forming P-49, Plastics in Food Packaging P-034, and any derivative thereof, through the affixation of improper copyright notices, improper copyright registrations, or otherwise;

3. Doing any act inconsistent with the Plaintiff's ownership of the copyrights in and to Plastics Forming P-049 and Plastics in Food Packaging P-034.

Dated at New Haven, this 24th day of September, 1985.

Signed The Honorable Ellen Bree Burns, United States District Court Judge

APPENDIX J

U.S. District Court, District of Connecticut

Denial of Motion for Reconsideration of Ruling and Order Dated September 22, 1989

No. Civil B-84-44 (EBB)

Ordered and filed February 20, 1991

Motion for Reconsideration of Ruling and Order Dated September 22, 1989

Plaintiff respectfully requests that the Court reconsider and vacates its order of September 22, 1989.

Denied

Signed F. Owen Eagan, United States Magistrate Judge.

APPENDIX K

U.S. Court of Appeals for the Second Circuit

Denial of Petition for Review of Granting of Appellees' Motion for Dismissal

No. 91-7751

Ordered and filed October 3, 1991

Order

It is hereby ordered that the motion be and hereby is denied

APPENDIX L

U.S. District Court, District of Connecticut

Judgment

No. Civil B-84-44

Ordered and filed September 20, 1991

Judgment

This cause having come on for consideration before the Mediation Panel and a Decision having been filed on June 20, 1991, approved by the Honorable F. Owen Eagan, United States Magistrate Judge and so ordered on June 26, 1991, by the Honorable Ellen Bree Burns, Chief Judge, United States District Court,

It is Ordered, adjudged and Decreed, as follows:

(1) That judgment be and is herby entered in favor of the plaintiff to recover of the defendants Business Communications, Inc. and Louis Naturman damages in the amount of $6,138.10 and

interest in the amount of $5,313.90 for a total of $11,452.00;.

(2) That judgment be and is hereby entered in favor of the defendant Business Communications, Inc. and Louis Naturman damages in the amount of $6,935.26 and interest in the amount of $5,767.71 for a total of $12,702.97

(3) That the net due defendants Business Communications, Inc. and Louis Naturman is $1,259.97, and

(4) That summary judgment be and is hereby entered in favor of the defendant Elaine Naturman, as set forth in the court's Omnibus Ruling dated May 13, 1988.

Dated at New Haven, Connecticut, this 20th day of September, 1991.

Kevin F. Rowe, Clerk, United States District Court

by Signed (unreadable)

Deputy in Charge

APPENDIX M

U.S. District Court, District of Conmnecticut

Letter of January 19, 1990 from Diernisse to Magistrate Owen Eagan.

No. Civil B-84-44 (EBB)

January 19, 1990

Villy Diernisse

9 Kaufman Drive Westwood NJ 07675

(201) 664-6222

January 19, 1990

Honorable Owen Eagan

U.S. District Court

450 Main St.

Hartford CT 06103

Dear Magistrate Eagan:

In the matter of Villy Diernisse v. Business Communications Co., et al; Civil B-84-44 (EBB). I consent to binding tripartite commercial arbitration, as discussed at the settlement conference before you on December 18, subject to the

conditions stated by you at that meeting.

1. That no testimony of witnesses will be taken.

2. That any past settlement negotiations not be introduced.

3. That both parties be permitted to pass on the competence of the other Party's nominee to the panel.

4. That Defendants comply with all the outstanding items of the pretrial order due October 16, 1989.

5. That Defendants furnish copies of the evidence in their possession as listed in item No. 11 of Plaintiff's Trial Memoranda of September 18, 1989.

I also request that the judicial officer appointed to the panel be someone else besides you or Judge Burns because both of you have participated in past settlement negotiations.

My nominee to the panel is Lewis Kurlantzick, Professor of Law at Univer-

sity of Connecticut Law School. Enclosed is a three page copy of his Curriculum Vitae.

Sincerely,

Signed

Villy Diernisse

cc

Clerk of the Court/New Haven

Clerk of the Court/Hartford

Messrs. Stanley Yavner, Lawrence Nadel, and Richard Feldman.

APPENDIX N

U.S. District Court, District of Connecticut

Letter of January 30, 1990 from Yavner to Magistrate Eagan

No. Civil B-84-44 (EBB)

January 30, 1990

January 30, 1990

Hon. U.S. Magistrate Owen Eagan

U:S. District Court

District of Connecticut

450 Main Street

Hartford, Ct. 06103

Re: Diernisse v. BCC et al

Civil Action No. B-84-44 (EBB)

Dear Magistrate Eagan:

Further to my phone message to your secretary about ten days ago and responsive to Mr. Diernisse's letter of January 19th please be advised that I consent to binding arbitration, on the issues of both liability and damages, as

discussed at the settlement conference with you on December 18th. I prefer to communicate my consent without conditions, but I feel compelled to respond to Mr. Diernisse's conditions, as well as to set forth a request for explanation. More specifically, I agree to Mr. Diernisse's conditions 1. and 3.

As to Mr. Diernisse's conditions 4. and 5., they should, of course, be reciprocally applied. Lastly, as to Mr. Diernisse's condition number 2., I trust that we will be guided by the Federal Rules of Civil Procedure.

As to Mr. Diernisse's request, I have no objection to the elimination of you from consideration for the panel, because your mission was specifically for purposes of a settlement conference; however, I do not agree to the elimination of Judge Burns, since in settlement talks before her (only on a single occasion by

means of a brief mention of settlement), the settlement discussions were incidental.

I would also request an explanation from Mr. Diernisse; namely, an indication of what was told to his selected arbitrator, at the time he was interviewed by Mr. Diernisse. This request for explanation is, of course, in order to determine the ground rules for approaching a potential arbitrator. Usually, the way this would be done would involve only a one sentence explanation of the substance of the matter, and no communication that could be considereded an argument for one side or the other. Also I would ask that an explanaation be given by Mr. Diernisse as to how payment was promised to his selected arbitrator.

I also question whether or not in determining competence under Mr. Diermisse's condition number 3., the other

side would be able to interview the selected arbitrator. All of this would indicate to me how I should approach my perspective nominee for the arbitration panel, whom I have not approached as of this time.

Respectfully submitted,

/S/

Stanley J. Yavner,

Attorney for Defendants

SJY:mt

cc: Richard Feldman, Esq.

Lawrence P. Nadel Esq.

APPENDIX O

U.S. District Court, District of Connecticut

Answer to Substituted Complaint

No. Civil B-84-44 (EBB)

Submitted May 20, 1988, filed May 25, 1988

Note: The first four pages of the Answer to Substituted Complaint are not being reproduced here because they are not relevant to the petition for the writ.

Affirmative Defenses

1. Plaintiff has failed to set forth any claim upon which relief may be granted.

2. Plaintiff, as an employee for hire under the Copyright Law of the United States, is without copyright rights in and to the works at issue herein.

3. Plaintiff is barred by the Statute of Frauds from enforcing any alleged

contractual agreement with defendants.

4. Plaintiff is barred from claiming copyright ownership in the works, or denying defendant BCC's ownership, by virtue of estoppel and/or laches.

5. Plaintiff's claims for relief predicated on the Copyright Law are barred by 17 U.S.C. §507(b).

6. Plaintiff's claims for relief predicated on the Connecticut Unfair Trade Practices Act are barred by Section 42-110g(f) of the Connecticut General Statutes.

7. Defendants hereby incorporate by reference all affirmative defenses set forth in defendant Business Communications Co., Inc.'s Answer, Affirmative Defenses and Counterclaims of or about February 13, 1984.

Wherefor, defendants demand that plaintiff's claims be dismissed with prejudice; that defendant BCC's counter-

claim be granted, and that defendants be awarded their costs and reasonable attorneys' fees, as well as such other relief as may appear just and proper.

Wolder, Gross & Yavner
Attorney for Defendants
41 East 42nd Street
New York, NY 10017
(212)687-3233
By
Jay A. Bondell, Esq.
Of Counsel:
Richard D. Feldman, Esq.
Evans, Feldman & Boyer
261 Bradley Street
Box 1694
New Haven, CT 06507
(203) 772-4900

APPENDIX P

U.S.District Court, District of Connecticut

Letter of November 26, 1980 from Diernisse to Naturman

No. Civil B-84-44 (EBB)

November 26, 1980

November 26, 1980

Mr. Lou Naturman

Business Communications Co.

Box 2070 C

Stamford CT 06906

Dear Lou,

I am writing to suggest that we approach our differences as a matter of business, and do not get involved in personalities. Remember what you said the last time the issue of money came up? "Let´s part friends."

Since we have already agreed that Business Communications is not going to publish the book on the retort pouch, we

may have some claims against each other; but there should not be any reasons why we cannot settle those amicably.

The retort pouch has nothing to do with our past dealings, and I am a little surprised at your threats of legal action, withholding of royalties, etc. However, I am willing to let that pass as something you just said on the spur of a monents anger. I am not scared of those threats, but do not believe that any legal action on either party´s part is warranted if we both handle this in a sensible manner, and I am more than willing do do my part.

Perhaps you can think this matter over, reach some conclusion as what you think is fair, and give me a call.

Sincerely,

Signed

Villy Diernisse

APPENDIX Q

U.S.District Court, District of Connecticut

Answer, Affirmative Defenses and Counterclaims

No. Civil B-84-44 (EBB)

Dated February 13, 1984, filed February 14, 1984

Note: The answers to plaintiif´s claims have not been reproduced here because they are not pertinent to the petition for the writ.

First Affirmative Defense

1. Each count of the complaint fails to state a claim upon which relief may be granted.

Second Affirmative Defense

1. The claims for relief set forth in Count I and in Count III are barred by 17 U.S.C. § 507(b) in that this action was not commenced within three years of the time that the claim, if any, of the

plaintiff against the defendant accrued.

Third Affirmative Defense

1. The claims for relief set forth in Count VI are barred by § 42-110 g(f) of the Connecticut General Statutes in that this action was not commenced within three yearts of the acts alleged to be violations of the Connecticut Unfair Trade Practices Act.

Fourth Affirmative Defense

1. At all times mentioned in the complaint, the plaintiff was the employee of the defendant, or was otherwise engaged in the preparation of a work for hire for the defendant, as provided in 17 U.S.C. § 101.

2. By reason of the above, the defendant is the owner of the copyright to the works referred to in the complaint under 17 U.S.C. § 201(b).

Fifth Affirmative Defense

1. On or about February 11, 1980, the

defendant registered its copyright in "Plastic Forming - P-049" with the Register of Copyrights of the United States of America, registration number TX 458-759.

2. The plaintiff, at all times mentioned in the complaint, had actual knowledge of such registration.

3. The defendant from February 1980 to the present, has published "Plastics Forming- P-49" with statutory copyright notice showing that it is the owner of the copyright in such work.

4. The plaintiff, at all times mentioned in the complaint, had actual knowledge of such claim of copyright.

5. The plaintiff, at all times mentioned in the complaint, has knowingly accepted payments from the defendant on account of such work, and has not, until the present controversy, claimed any ownership interest in such copyright to such work.

6. By reason of the above, the plaintiff has waived any right to claim copyright in such work, and has estopped himself by his conduct from presenting such claim.

Sixth Affirmative Defense

1. On or about August 19, 1980, the defendant registered its copyright in "Plastics in Food Packaging (P-034R)" with the Register of Copyrights of the United States of America, registration number TX 531-972.

2. The plaintiff, at all times mentioned in the complaint, had actual knowledge of such registration.

3. The defendant, from August 1980 to the present, has published "Plastics in Food Packaging (P-034R)" with statutory copyright notice showing that it is the owner of the copyright in such work.

4. The plaintiff, at all times mentioned in the complaint, had actual

knowledge of such claim of copyright.

5. The plaintiff, at all times mentioned in the complaint, has knowingly accepted payments from the defendant on account of such work, and has not, until the present controversy, claimed any ownership interest in such copyright to such work.

6. By reason of the above, the plaintiff has waived any right to claim copyright in such work, and has estopped himself by his conduct from presenting such claim.

Seventh Affirmative Defense

1. On or about February 11, 1980, the defendant registered its copyright in "Plastic Forming - P-049" with the Register of Copyrights of the United States of America, registration number TX 458-759.

2. The plaintiff, at all times mentioned in the complaint, had actual knowledge of such registration.

3. The defendant from February 1980 to the present, has published "Plastics Forming- P-49" with statutory copyright notice showing that it is the owner of the copyright in such work.

4. The plaintiff, at all times mentioned in the complaint, had actual knowledge of such claim of copyright.

5. The plaintiff, at all times mentioned in the complaint, has knowingly accepted payments from the defendant on account of such work, and has not, until the present controversy, claimed any ownership interest in such copyright to such work.

6. The defendant during such time has invested substantial amounts of time and money in promoting such work, and the plaintiff, at all times mentioned in the complaint, has had actual knowledge of the same.

7. By reason of the above, the plain-

tiff has intentionally and unexusably delayed presenting his claim to the prejudice of the defendant, and therfore his claim is barred by laches.

Eighth Affirmative Defense

1. On or about August 19, 1980, the defendant registered its copyright in "Plastics in Food Packaging (P-034R)" with the Register of Copyrights of the United States of America, registration number TX 531-972.

2. The plaintiff, at all times mentioned in the complaint, had actual knowledge of such registration.

3. The defendant, from August 1980 to the present, has published "Plastics in Food Packaging (P-034R)" with statutory copyright notice showing that it is the owner of the copyright in such work.

4. The plaintiff, at all times mentioned in the complaint, had actual knowledge of such claim of copyright.

5. The plaintiff, at all times mentioned in the complaint, has knowingly accepted payments from the defendant on account of such work, and has not, until the present controversy, claimed any ownership interest in such copyright to such work.

6. The defendant during such time has invested substantial amounts of time and money in promoting such work, and the plaintiff, at all times mentioned in the complaint, has had actual knowledge of the same.

7. By reason of the above, the plaintiff has intentionally and unexusably delayed presenting his claim to the prejudice of the defendant, and therfore his claim is barred by laches.

Ninth Affirmative Defense

1. For the reasons set forth above, the plaintiff is guilty of having unclean hands with respect to the matters alleged

in his complaint.

2. For that reason, the court should not grant any equitable relief to the plaintiff.

Counterclaim

First Count:

1. At all times mentioned in the complaint, the plaintiff was the employee of the defendant, or was otherwise engaged in the preparation of a work for hire for the defendant, as provided in 17 U.S.C. § 101.

2. By reason of the above, the defendant is the owner of the copyright to the works referred to in the complaint under 17 U.S.C. § 201(b).

3 On or about February 11, 1980, the defendant registered its copyright in "Plastics Forming - P-049" with the Register of Copyrights of the United States of America, registration number TX 458-759.

4. On or about August 19, 1980, the defendant registered its copyright in "Plastics in Food Packaging (P034R)" with the Register of Copyrights of the United States of America, registration number TX 531-972.

5. The plaintiff has claimed to be the owner of the copyright to such works, and has, upon information and belief, registered its claim to copyright therein with the Register of Copyrights of the United States of America.

6. The action of the plaintiff in so registering its claim to copyright was taken with actual knowledge of the rights of the defendant as set forth above, and with the actual intent to cause financial injury to the defendant.

7. The defendant is entitled to a declaratory judgment that it is the sole owner of such copyrights, that the registration of the plaintiff is improper, and

to its damages incurred as a result of the above.

Second Count:

1. In 1980 the plaintiff agreed with the defendant to produce a work to be known as "The Retortable Pouch: What´s Happening?".

2. The defendant paid the plaintiff´s out-of-pocket expenses for such work, and the plaintiff accepted such payment.

3. The plaintiff breached its agreement with the defendant by not producing such work within the time agreed.

4. As a result of the breach by the the plaintiff, the defendant incurred promotion costs which could not be recouped by sales of the work, and was damaged in its reputation by reason of its failure to publish such work as promised.

WHEREFORE, the defendant claims judgment:

1. Dismissing the complaint, with costs;

2. Declaring that the defendat is the owner of the copyrights in question;

3. Awarding compensatory damages of $50,000.00 to the defendant;

4. Awarding punitivve damages of $250,000.00 to the defendant;

5. awarding reasonable attorney,s fees under 17 U.S.C. § 505 to the defendant;

6 Awarding the costs of this action to the defendant; and

6. (sic) Granting the defendant such other and further relief, in law and at equity, as to the Court may appear just and proper.

Dated at Stamford, Connecticut, this 13th day of February, 1984

John J. Graubard

Graubard and Graubard

Attorneys for the Defendant,

Business Communications Co., Inc.

162 Bedford Street

Stamford, Connecticut 06901-1985

Tel.: 203-327-6720

APPENDIX R

U.S. District Cout, District of Connecticut

Memorandum of Law of Defendants for Mediation Panel

No. Civil B-84-44 (EBB)

Submittted April 2, 1991

Note: Only the front matter has been reproduced here as it shows the pertinency to the petition for the writ and summarizes Appelees arguments. Also the page numbers have not been reproduced because they are not pertinent to the petition for the writ.

TABLE OF CONTENTS

Index of Cases

Statutes and Authorities

I. BACKGROUND AND FACTS

II ARGUMENT

A. Even In The Test To Determine "Work for Hire", Pronounced by the Supreme Court in the Reid Case in 1989, BCC and Diernisse Had a Rela-

tionship Whereby BCC Became the Owner of Rights to the Work

B. Alternatively, If a "Work for Hire" Is Not Found, BCC and Diernisse Should Be Considered Joint Authors of the Subject Matter of this Action

C. Plaintiff Is Not Entitled to Statutory Damages and Attorney Fees, Because Copyright Was Not Registered by Plaintiff Within Three Months of the Publication Date of the Work Registered

D. Plaintiff Committed Fraud in Obtaining His Copyright Registrations (Exhibits J-1 and J-2) For Failure to Disclose BCC's Previous Registration in part 5 of the Application for Registration, and For Attempting to Extend His Copyright Term By Stating a False Publication Date Eight Months Earlier Than Publication Occurred

E. Plaintiff's Registration Certificates TX 1-279-830 and TX 1-279-831 Are Defective, in that the Publications Covered By Those Certificates Included Defective Copyright Notices, As Not Including the Name of the Alleged Copyright Owner, Mr. Diernisse

F. P-49 and P-034R Did Not Contain Subject Matter of Sufficient Originality to Warrant Copyright Protection; and the Allegedly Derivative Works of BCC, Which Followed P-49 and P-034R Were In Fact Based More Upon Its Undisputed Publication P-033R, Issued in 1978 (Exhibit A)

G. The Mediators Should Award Damages Only on the Counterclaim; But if damages Are Deemed Owing to Plaintiff, They Should Be Limited By the Percentage Payment Originally Agreed to, and Not Yet Paid, and with a Subtraction of the $1,200 "Settlement" Evidenced by Pages 22-23 of the 1984 Deposition of Plaintiff (Exhibit G-1)

III. CONCLUSIONS

Note: The Index of Cases appeared on page No. i.

INDEX OF CASES

Bessett, Inc. v. Germain, et al, 18 F. Supp. 249 (D.C. Ma. 1937)

Business Trends Analysts v. Fredonia Group, Inc., 700 F. Supp. 1213 (S.D.N.Y. 1988)

Community for Creative Non-Violence v. Reid, 57 U.S.L.W. 4607 (U.S. Supreme Court, June 5, 1989

Donna v. Dodd, Mead & Co., 374 F. Supp. 429 (S.D.N.Y. 1974)

Florabelle Flowers, Inc. v. Markovits, Inc., 296 F. Supp. 304 (S.D.N.Y. 1968)

Klasmer v. Baltimore Football, Inc., 200 F. Supp. 255 (D.C. Md. 1961)

National Comics Publications Inc. v. Fawcett Pub. Inc., 191 F.2d 594 (2d Cir. 1951)

Picture Music, Inc. v. Bourne, Inc. 314 F. Supp. 640 (S.D.N.Y. 1970) affirmed on other grounds, 457 F.2d 1213 (2d Cir. 1971) cert. den'd 409 U.S. 997 (Sup. Ct. 1972)

Rural Telephone Service Company v. Feist Publications Inc. Decision issued March 27, 1991 (U.S. Sup. Ct.)

Sweet Music, Inc. v. Melrose Music Corp., 189 F. Supp. 655 (S.D. Ca., Central Division 1960)

Note: Statutes and Authorities appeared on page No. ii.

STATUTES

U.S. Code, Title 17, Section 19
U.S. Code, Title 17, Section 101
U.S. Code, Title 17, Section 201(a)
U.S. Code, Title 17, Section 412(2)
U.S. Code, Title 17, Section 504

AUTHORITIES

Nimmer on Copyright, Section 6.03 (1989)

APPENDIX S

U.S. District Court, District of Connecticut

Deposition of Louis Naturman

No. Civil B-84-44 (EBB)

Depostion taken on October 11, 1984 and February 25, 1985

Page 21

Q Which, I am sure are important. Did you get any feedback from any of the purchasers on either of these books?

A Yes.

Q What was the feedback, generally -- good, bad, or indifferent?

Page 22

A Unfortunately, some of the feedback that we got for one of them was questioning some of the data that were in the report.

Q Which book was being questioned, do you recall?

A I don't recall, I think it was the

Food Packaging.

Page 58

Q When Mr. Diernisse was first contacted or when he first contacted BCC and the first arrangement was struck, was the BCC's intention that Mr. Diernisse would be recognized as the author of the book?

A Of course,

Q And he is mentioned as the author in FORMING I?

A Here it is, right on the front page (indicating).

Q So the answer is yes?

A The answer is yes.

Q And the same thing is true of FOOD PACKAGING I, he is also mentioned as the author in FOOD PACKAGING I?

A Yes.

Page 63

Q One of Miss Bakker's jobs, if I recall, was to supervise a number of authors who may have been writing books

for the company, is that correct?

A Yes.

Q And she was a project supervisor, is that a fair characterization of her duties?

A I guess so, yes.

Q How many other authors did she supervise at any particular time?

A At any particular time she probably was not involved with more than one or two at the most.

Q Was she also discharging other duties on the company's behalf at the time she was involved with other authors?

A She was -- most of the work she did she worked on reports.

Q She wrote reports?

A Yes.

Page 64

****

Q Did you ever have any discussions with Miss Bakker particularly about Mr.

Diernisse as far as what she was to supervise with respect to Mr. Diernisse's writing Food Packaging I and Forming I?

A I'm trying to recall the exact nature of any discussion. Most of the time the material was sent to her and worked through her. I'm trying to remember actually our discussion, saying, "what are you going to do?" or "Marilyn, what are you not going to do?" But the fact that she handled most of the work with Villy, when he came up he talked to her more than to me about the progress of the reports. So I can't remember an exact division of duties as precisely stated at that time.

Page 65

Q So you don't know the exact division of duties between Miss Bakker and Mr. Diernisse with respect to Food Packaging I or Forming I?

A I don't remember if I sat down and

precisely divided the duties and supervision between Marilyn and myself. But the exact nature of -- a division of labor as it were -- between Marilyn and Villy was that Marilyn served as the editor, I guess, and she had to supervise the content of the reports.

Q Do you know specifically what duties she discharged with Mr. Diernisse in her capacity as editor?

A She went over the copy. She critiqued it. She asked questions. She made suggestions. She sent him material that may have had a bearing on what he did. She did anything that a good editor would do.

Q. And that was basically what she was to do with Mr. Diernisse?

A Yes.

Q Did she have any other responsibilities that you can think of?

A Not right now.

Q Does the company have a standard first sheet for all of its projet reports and books?

A What do you mean by first sheet?

Q The sheets which indicate the title of the book and would seem to have a photocopy of BCC´s logo and the name of the author or some other person at the bottom.

A It is more or less standard. it varies sometimes from title to title but by and large it is what you see is it most of the time.

Q Is it the company´s policy to put the name of the author or the project supervisor at the bottom of that Page?

A Yes

Q Do you know whether Miss Bakker´s name appears at all in Forming I?

A I don´t remember it. If this is a sample, this is the sample but I am not

sure. I am not sure that it does.

Q Now, Forming II, has the name of Dawood Ghaznavi on the bottom. He is listed as the project supervisor. What were his duties as the project supervisor?

A He basically did most of the work, most of the research and all of the writing. And he did the report.

APPENDIX T

U.S.Supreme Court

Statutes and Constitution

No. ?

Date: Not applicable

Connecticut General Statutes .

§ 52.576(a) No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues, except as provided in subsection (b) of this section.

§ 52. 581(a) No action founded upon any express contract or agreement which is not reduced to writing , or of which some note or memorandun is not made in writing and signed by the party to be charged therewith or his agent, shall be brought but within three years after the right of action accrues.

Title 17 U.S.C. § 101

***

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

***

A "work made for hire" is-

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instument signed by them that the work shall be considered a work made for hire. For the purpose of

the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literay, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens ot the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
FEB 3 1992
OFFICE OF THE CLERK

No. 91-1115

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

VILLY DIERNISSE - PETITIONER

VS.

BUSINESS COMMUNICATIONS COMPANY, INC.

and LOUIS NATURMAN - RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE U. S. CT. OF APP. (2d CIR.)

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STANLEY J. YAVNER
Attorney for Respondent
120 North Main Street
Suite 203
New City, New York 10956
(914) 638-3310

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
THE PROCEEDINGS BELOW	5
ARGUMENT	6
CONCLUSIONS	14

There is no parent or subsidiary company for the corporate defendant.

STANLEY J. YAVNER

QUESTIONS PRESENTED

1) Is the decision and judgment of the United States District Court for the District of Connecticut, by its Chief Judge, binding upon the parties herein and not subject to this or any other appeal or appellate consideration?

2) As to the questions presented by Petitioner, numbers 3)-11), should Petitioner be considered to have had his "day in court", since all such questions were presented to the lower courts (some on more than one occasion) and all such questions were decided against Petitioner in a binding, non-appealable decision?

3) Additional to the foregoing, does the recognition by the Mediation Panel of the important issue of "work for hire" and the consideration of that issue by the United States Supreme Court in the case of

Community for Creative Non-Violence v. Reid, 109 S.Ct. 2166 (1989), automatically compel consideration that joint ownership existed because of the end portion of that decision, which raised joint ownership as a possible factual alternative to "work for hire"?

No. 91-1115

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

VILLY DIERNISSE - PETITIONER

VS.

BUSINESS COMMUNICATIONS COMPANY, INC.

and LOUIS NATURMAN - RESPONDENTS

OPPOSITION TO PETITION

FOR WRIT OF CERTIORARI

Respondents, Business Communications Company, Inc. and Louis Naturman, respectfully oppose the petition for certiorari in this matter. The United States

District Court for the District of Connecticut conducted proceedings on Petitioner's complaint for almost eight years, and in 1991, with the consent of the parties herein, referred the matter for binding decision to a Mediation Panel (without right to appeal in the event of unanimity of the Panel), composed of a designee of Petitioner, a designee of Respondents and a designee of the Court.

In 1991, the United States District Court for the District of Connecticut entered its judgment upon the unanimous decision of the Mediation Panel in favor of Respondents. Notwithstanding the Order of the United States District Court establishing Mediation Panel schedules and rules removing the right of Appeal in the event of a unanimous decision of that Panel, Petitioner appealed to the United

States Court of Appeals for the Second Circuit; and upon motion of Respondents, the United States Court of Appeals for the Second Circuit dismissed the appeal.

THE PROCEEDINGS BELOW

Annexed as Appendix I hereto is the Order of the United States District Court for the District of Connecticut setting the schedule for, and the rules for, mediation, upon consent of the parties. Page 4 thereof, under the heading "Binding Mediation", Section 11.B. clearly sets forth that no right of appeal will be had by either party in the event of a unanimous determination by the Mediation Panel.

As is shown by Petitioner's Appendices No. 1, page 4 (APPENDIX B), the determinations and the decision of the

Mediation Panel were unanimous.

Nevertheless, Petitioner filed an Appeal to the United States Court of Appeals for the Second Circuit, which, as Petitioner admits, was dismissed upon motion of the present Respondent.

Now comes the Petitioner again to petition for a Writ of Certiorari before this Court, and such Petition should be rejected out of hand for the same reasons as dismissal was granted in the United States Court of Appeals.

ARGUMENT

Preliminarily, it is incumbent upon Respondent to set forth, with examples, that the Petition filed herein is a statement and chronology of misinformation and falsehoods to this Court.

In Petitioner's Statement of the Case, the statement of the contract

relating to the Retort is not true, in that there was no agreement of the parties that a payment of $1.50 extra per page for finished typing would be paid by Respondent. Accordingly, Respondent-Appellee did not want "to reduce the price" to $1.35 per page. Conversely, it was Petitioner-Appellant who wanted to increase the payment for typing from $1.35 per page to $1.50 per page. (See pages 4-6 of the Petition).

Page 7 of the Petition includes more misstatements. Respondent's Answer to the Substituted Complaint was not filed late, as related by Petitioner. Nor did Respondent drop its counterclaim in the Answer to the Substituted Complaint. Such outrageous claims were the subject of multiple, repeated motions, rejected out of hand by the Judge and the Magistrate.

(Petitioner's Appendix D and others).

Page 8 of the Petition includes a misleading statement by Petitioner, whereby the stipulated main issue for the Preliminary Injunctive hearings related to the "work-for-hire" doctrine, but now comes the Petitioner to state that the only issue "in this matter" is that doctrine.

Page 9 of the Petition indicates clearly that Petitioner's so-called conditions for agreeing to the binding mediation are no less than fraudulent. Petitioner admits that, in early 1990, he set forth conditions, including that allegedly missing information and documents during discovery be supplied. The Mediation Panel and the Court determined that such information and documents had already been supplied; and,

in fact, at no time did Petitioner ever argue that his conditions had not been satisfied for mediation. In further point of fact, after the Mediation Panel Order (Respondent's Appendix I), Petitioner filed his brief before the Mediation Panel, participated in framing issues for the Mediation Panel, argued before the Mediation Panel and did not bring up the subject of conditions until the unanimous opinion of the Mediation Panel against Petitioner was rendered. He wanted it both ways.

Page 14 and 15 of the Petition herein constitutes outright fraud. In those pages, Petitioner argues that he was limited to two hours to argue before the Mediation Panel and then characterizes that the proof presented was not sufficient to lead to a Mediation Panel

decision in favor of Respondent. It is absolutely fact that Mr.Diernisse was provided on May 21, 1991 and June 20, 1991, with in excess of eight hours of argument time at the hearing. It should also be of interest to this Court that the mediators, one of which had been chosen by Petitioner, would not cut off Petitioner's argument at the hearing until Petitioner stated his satisfaction that he had had enough time. To argue before this Court that only two hours were provided to Petitioner at the Mediation Panel hearing is outrageous fraud.

To move from page 15 to the end of the Petition and point out each and every falsehood would fill hundreds of pages, which are not worthy of the consumption of the time of this Court or Respondent. Petitioner characterizes proof during the

eight year ordeal before the Connecticut Federal Court as "tainted", supported by a "small amount of research material", representing Respondent's "cheating" and indicative of Petitioner's plea for costs.

Conversely, the relevant and material facts relating to the issue presented by this Petition can be concisely stated as follows: On January 14, 1991, the Mediation Panel issued its Order, which called for the setting up of a Mediation Panel, the submission of Mediation Memoranda, the presentation of evidence to such Panel and binding mediation in the event of unanimity. The Order was issued upon the agreement of the parties to the mediation.

The United States District Court for the District of Connecticut, on June 26, 1991, issued its Order upon decision of

the Mediation Panel, which was unanimous in favor of Respondent.

By way of background, the Honorable Court should understand the following circumstances. Defendants herein (Business Communications Company and Naturman) were subjected for eight years to the intentional infliction by Mr. Diernisse of great harm, inconvenience and expense. A few years ago, Mr.Diernisse embarked upon a scheme, whereby his counsel, without permission of the Federal District Court Judge, withdrew from the proceedings, enabling Mr. Diernisse to move forward pro se. Mr. Diernisse used his pro se status to get away with multiple and repeated motions every time he was thwarted by either the District Court Judge or the Magistrate. Upon information and belief, the undersigned

indicates with Rule 11 firmly in mind, that most of Mr. Diernisse's papers submitted after he became pro se, were in fact, written by an attorney. All of this was used by Mr. Diernisse to attempt to obtain sympathy and excuse for his repeated violations of proper procedure and courtesy. His main thrust was to cause unnecessary activity to the point where counsel fees were expended by Respondents in the amount of many tens of thousands of dollars, but without concurrent cost to Mr. Diernisse.

Mr. Diernisse had his day in court, and in fact, had his many days in court, over and over again. His expansion of the proceedings, his claimed ignorance of proper procedure and his moving forward with appeals, clearly denied by his own agreement, represents no less than

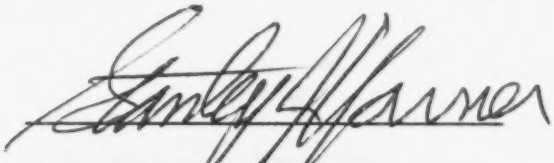
criminal conduct. Mr. Diernisse is now voluntarily retired (for the most part). He has used that status and his many hours of free time, with this case, since 1984 to wrongfully oppress Respondents into financial ruin, and to attemtp to "grab the brass ring". He has claimed millions of dollars in damage, while offering no proof, such as for "emotional distress". His claims are frivolous and malicious.

CONCLUSIONS

Instead of granting the Petition, the United States Supreme Court should, in its wisdom, order that a bill of costs and counsel fees should be submitted by Respondents for payment to, in some way, right the wrong that has been committed over the past eight years. Such relief is

earnestly and respectfully requested.

Respectfully submitted on February 3, 1992.



STANLEY J. YAVNER
Attorney for Respondents
120 North Main Street
Suite 203
New City, New York 10956

CERTIFICATE OF SERVICE

I, STANLEY J. YAVNER, ESQ., of Suite 203, 120 North Main Street, New City, New York 10956, 914-638-3310, a member of the Bar of the Supreme Court of the United States, hereby certifies that three copies of the foregoing OPPOSITION TO PETITION FOR WRIT OF CERTIORARI and the annexed APPENDIX I were mailed by postage prepaid, first class mail, on the 3rd day of February, 1991 to:

Mr. Villy Diernisse
Pro Se Petitioner
5 Kaufman Drive
Westwood, New Jersey 07675
201-664-6222

Dated: Feb. 3, 1992

STANLEY J. YAVNER

Supreme Court, U.S.
FILED
FEB 3 1992
OFFICE OF THE CLERK

No. 91-1115

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

VILLY DIERNISSE - PETITIONER

VS.

BUSINESS COMMUNICATIONS COMPANY, INC.

and LOUIS NATURMAN - RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE U. S. CT. OF APP. (2d CIR.)

OPPOSITION TO PETITION

FOR WRIT OF CERTIORARI

APPENDIX I

STANLEY J. YAVNER
Attorney for Respondent
120 North Main Street
Suite 203
New City, New York 10956
(914) 638-3310

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VILLY DIERNISSE :

VS. : CIVIL NO. B-84-44 EBB

BUSINESS COMMUNICATIONS, INC. ET AL :

MEDIATION PANEL ORDER

WHEREAS, the parties have agreed to attempt to resolve their differences by mediation:

Now, therefore, with the consent of all parties, it is hereby ORDERED:

A. THE MEDIATION PANEL

APPOINTMENT

1. The Attorney J. Reid Murphy, 450 Main Street, Hartford, Connecticut 06103; Attorney Edwin Komen, Suite 201, 80 Pennsylvania Avenue S.E., Washington, D. C. 20003; and Professor Lewis Kurlantzick, University of Connecticut School of Law, 55 Elizabeth Street, Hartford, Connecticut 06105, are appointed as the Mediation Panel.

J. Reid Murphy shall serve as Chairperson.

POWERS AND AUTHORITY

2. That the Mediation Panel shall consider and submit to the parties fair and just settlement terms with respect to the issues among all the parties in the above-entitled cases.

TIMETABLE

3. That on or before April 3, 1991, each party shall exchange with all other parties, and submit to each member of the Mediation Panel, a mediation brief not to exceed 15 pages; outlining the issues to be resolved, disclosing the party's factual and legal positions concerning each issue, and identifying and attaching, where practicable, each exhibit to be introduced by the party at the mediation hearings. Do not file mediation briefs in the clerk's office.

4. That on or before April 17, 1991, each party may submit a reply brief.

5. That on April 15, 1991, at ten o'clock in the morning, counsel shall meet with the undersigned judicial officer to discuss procedures and the presentation of evidence at the hearing. At that meeting, all proposed exhibits will be marked and any rulings on admissibility will be made by this judicial officer.

DESCRIPTION OF HEARING

6. Counsel should be prepared to summarize and comment on the evidence and law of the case.

No testimony is to be taken from witnesses, however, counsel may restate the sworn testimony of anticipated trial witnesses.

In making their statements, counsel are limited as to the evidence that would be

admissible at trial. Counsel are permitted to mingle representations of fact with legal argument, considerations of responsibility and restraint must be observed. Counsel may only present factual representations supported by references to discovery material, including but not limited to depositions, stipulations, admissions, answers to interrogatories, signed sworn statements of witnesses or other documents.

Statements, reports and depositions may be read from, but not at undue length.

Physical evidence, including documents and pictures may be exhibited during counsel's presentation and submitted to the panel for consideration during deliberation, provided they have been approved as admissible by this presiding judicial officer. Such exhibits should be marked and will be returned to the respective parties

at the conclusion of the panel's deliberation.

7. That at the hearings, the formal rules of evidence will not control, but under the supervision of Attorney Murphy, all pertinent evidence supporting the parties' positions will be admitted to insure complete and fair presentations by the parties; no court reporter or recording equipment will be allowed; the Mediation Panel may address questions to counsel and the parties; counsel, through the Mediation Panel, may address pertinent questions.

8. That hearings before the Mediation Panel shall be conducted on April 29 and April 30, 1991:

A. The plaintiff shall present all its case-in-chief evidence on April 29, 1991;

B. The defendant shall present all

their case-in-chief evidence on April 30, 1991;

9. That Mediation hearings shall commence at 10:00 A.M. and conclude at 4:30 P.M. each day.

POST-HEARING PROCEDURES

10. That immediately following the hearings, the Mediation Panel will meet privately to attempt to reach fair, reasonable and just settlement proposals with respect to the issues submitted for deliberation.

BINDING MEDIATION

11. That the parties by unanimous agreement, having decided to accept the settlement decision of the Mediation Panel as binding, the following rules will govern:

A. That if the Mediation Panel fails to achieve unanimity: The case will be reported as "not settled" and revert to

premediation status quo: the evidence presented at the hearings will be deemed confidential; and no panel member may be called as a witness in future proceedings among the parties;

B. That on the other hand, if the Mediation Panel renders unanimous determinations: Its findings and conclusions shall be binding on the parties with no right of appeal therefrom; the parties shall file all necessary moving papers to dismiss the litigation with prejudice; and the determinations shall have the full force and effect of a judgment at law and be "So Ordered" by the Court.

12. Each party will pay for the Mediation Panel member that they have selected directly. The Chairperson will be compensated rate of $100 per hour; the payment of which is to be shared equally

between the two parties regardless of the results of the mediation proceeding.

SO ORDERED:

Dated at Hartford, Connecticut, this 13th day of January 1991.

/s/

F. Owen Eagan
United States Magistrate Judge